TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 39

DE FOREST HUBBURD, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 2, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 22028

DEFOREST HULBURD and HUGH MCBIRNEY JOHNSTON, Executors of the Estate of Chas. H. Hulburd, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Alfred T. Carton, Esq., John E. Hughes, Esq.
For Comm'r.: A. H. Murray, Esq., R. Wilson, Esq., J. A. Lyons, Esq., A. Carnduff, Esq., J. R. Johnston, Esq.

DOCKET ENTRIES

1926

Dec. 20—Petition received and filed. Taxpayer notified.
Dec. 21—Copy of petition served on General Counsel.

1927

Feb. 19—Answer filed by General Counsel.
Mar. 24—Copy of answer served on taxpayer. General Calendar.

1928

Oct. 25—Notice of appearance of John E. Hughes as counsel for taxpayer filed.
Nov. 28—Motion for leave to file amended petition, amendment tendered, filed by taxpayer. 11/30/28 granted.
Dec. 1—Application for order to take depositions filed by taxpayer.
Dec. 6—Hearing set Jan. 16, 1929.
Dec. 5—Copy of motion served on General Counsel.
Dec. 11—Order to take depositions of Louis Bauer, et al. entered.

1929

Jan. 5—Motion for transfer to Reserve Calendar filed by taxpayer. Motion denied 1/7/29.

Jan. 5—Application under Sec. 913 for preliminary examination of transferee proceedings filed by taxpayer.

[fol. 2] Jan. 9—Depositions of Louis Bauer, et al., filed (1). Copy served by Notary.

Jan. 15—Motion for a continuance to Feb. 14, 1929 filed by General Counsel. 1/16/29 granted to 2/14/29.

Jan. 16—Hearing had before Mr. Phillips on motion to continue. Continued to Feb. 14, 1929.

Feb. 1—Answer to amended petition filed by General Counsel. Copy served 3/7/29.

Feb. 7—Application for subpoena duces tecum filed by General Counsel. (1).

Feb. 14—Subpoena issued, Norman W. Church.

Feb. 14—Subpoena issued, Norton H. Van Sicklen, Jr.

Feb. 14—Hearing had before Mr. Smith on Commissioner's motion to continue for 60 days—granted.

Feb. 14—Order of continuance to April 15, 1929 entered.

Mar. 1—Motion to place on the Chicago, Ill. Field Calendar, filed by General Counsel.

Mar. 27—Hearing set on motion April 3, 1929.

Apr. 3—Hearing had before Mr. Smith on Commissioner's motion to transfer to Circuit Calendar. Granted, hearing at Chicago.

Apr. 3—Order to transfer to Circuit Calendar for hearing at Chicago, Illinois, entered.

May 10—Transcript of hearing 4/3/29 filed.

1930

Feb. 15—Motion to vacate order placing on the Circuit Calendar and to have issue of statute of limitations before other issues, filed by taxpayer. 2/19/30 copy served on General Counsel.

Feb. 19—Hearing set March 5, 1930.

Mar. 5—Hearing had before Mr. Van Fossan, Div. 9 on petitioner's motion to limit hearing—objected to by Commissioner—granted and limited hearing granted at Washington—remaining issues to Field Calendar.

Mar. 5—Order that proceeding be placed on Calendar of April 23, 1930 at Washington on statute of limitations and to remain on Circuit Calendar for hearing at Chicago, Illinois on other issues entered.

1930

Apr. 23—Hearing had before Mr. Seawell, Div. 4 on merits. Brief due May 23, 1930.

Apr. 25—Transcript of hearing 4/23/30 filed.

May 22—Brief filed by General Counsel.

May 23—Brief filed by taxpayer.

[fol. 3] Oct. 14—Findings of fact and opinion rendered, Mr. Seawell, Div. 14. Order will be entered accordingly.

Oct. 14—Order to restore to Calendar of December 8, 1930 entered.

Oct. 29—Order vacating order of Oct. 14 restoring to Calendar of 12/8/30 and to place on Circuit Calendar in the vicinity of Chicago in connection with docket 20317 entered.

1931

Mar. 13—Application for order to take deposition filed by General Counsel.

Mar. 21—Order to take depositions of N. W. Church, entered.

Mar. 26—Order amending order of 3/21/31 by changing date to 4/15/31 entered.

Apr. 28—Depositions filed.

1932

Jan. 21—Hearing set for week beginning March 21, 1932 at Chicago, Ill.

Feb. 13—Motion for order to produce filed by General Counsel.

Feb. 18—Motion to amend answer to amended petition filed by General Counsel. Amendment to answer tendered.

Feb. 16—Order to produce certain records entered.

Feb. 27—Motion to amend answer granted.

Feb. 27—Application for subpoena duces tecum of Norman W. Church filed by General Counsel.

Feb. 27—Subpoena issued—duces tecum—N. W. Church. 3/7/32 subpoena served.

Mar. 7—Application for subpoena duces tecum (4) N. H. Van Sicklen, Sr., N. H. Van Sicklen, Jr., Alfred D. Edwards & C. F. Van Sicklen, filed by General Counsel.

Mar. 7—Subpoena issue, duces tecum (4) C. F. Van Sicklen, A. D. Edwards, N. H. Van Sicklen and N. H. Sicklen, Jr. 3/7/32 subpoenas served (3).

1932

Mar. 7—Application for subpoena duces tecum, Paysoff Tinkoff, C. P. A. & L. L. B. filed by General Counsel.

Mar. 7—Subpoena issued, duces tecum, Paysoff Tinkoff, 3/7/32 subpoena served.

Mar. 14—Application for subpoena, F. A. Thulin, filed by General Counsel.

Mar. 14—Subpoena issued, F. A. Thulin, 3/14/32 subpoena served.

[fol. 4] Mar. 14—Application for subpoena of Hulburd and Johnston filed by General Counsel.

Mar. 14—Subpoenas issued (2) Hulburd and Johnston. 3/17/32 subpoenas served (2).

Mar. 15—Applications for subpoenas of Fauntleroy, Van Nortwick and Hunter filed by General Counsel.

Mar. 15—Subpoenas issued (3) duces tecum, Hunter, Fauntleroy and Van Nortwick.

Mar. 15—Subpoenas served (2) Van Nortwick and Fauntleroy.

Mar. 17—Application for subpoena duces tecum, David Burnet, filed by taxpayer.

Mar. 18—Subpoena issued, duces tecum, David Burnet. 3/22/32 subpoena served.

Mar. 18—Applications for subpoenas, Frank Carlton and R. K. O'Hara filed by General Counsel. Subpoenas issued and served.

Mar. 25—Hearing had before Mr. Sternhagen, Div. 10, called on merits, petitioner's reply to Commissioner's amendment to answer to amended petition filed. Briefs due 4/25/32 and reply briefs 5/2/32. Called from Calendar of March 25, 1932.

Apr. 21—Motion for extension to 5/24/32 to file brief filed by General Counsel. 4/22/32 granted to both sides.

May 18—Motion for extension to 6/23/32 to file brief filed by General Counsel. 5/20/32 granted.

May 23—Motion for extension to file brief filed by taxpayer.

May 24—Motion to file briefs extended 30 days after date when transcript is filed and granted.

Jun. 15—Motion for extension of 30 days after date when transcript is filed to file brief, filed by General Counsel. 6/16/32 granted.

Dec. 13—Transcript of hearing of March 21, 1932 filed.

1933

Jan. 3—Brief filed by taxpayer.

Jan. 28—Motion for extension of time to file brief filed by General Counsel. 1/30/33 granted.

Jan. 30—Brief filed by General Counsel.

Apr. 7—Opinion rendered, J. M. Sternhagen, Div. 10. Judgment will be entered for the petitioners.

Apr. 12—Judgment entered, J. M. Sternhagen, Div. 10.

Jul. 7—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.

Jul. 14—Proof of service filed by General Counsel. (2).

[fol. 5] Sep. 2—Motion for extension to 10/5/33 to complete record filed by General Counsel,

Sep. 5—Order enlarging time to Oct. 5, 1933 for preparation of evidence and delivery of record entered.

Sep. 8—Statement of evidence lodged.

Sep. 8—Proof of service filed.

Sep. 8—Præcipe filed filed—proof of service thereon.

Sep. 27—Agreed statement of evidence approved and ordered filed.

Oct. 2—Order entered extending time for transmission of record to October 14, 1932.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed Dec. 20, 1926

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue, in his notice of deficiency (IT:E:RR: 280-60D), dated October 27, 1926 to Estate of Charles H. Hulburd. The petitioners as a basis for their proceeding make the following allegations, those contained in paragraphs 4 and 5 being made upon information and belief:

1. The petitioners are the persons appointed executors in the will of Charles H. Hulburd, late of Chicago, Cook County, Illinois, deceased, and Letters Testamentary were issued to them by the Probate Court of Cook County, Illinois, February 20, 1924. (The Petitioner DeForest Hul-

burd individually, the petitioner Hugh McBirney Johnston as trustee under said will, and the petitioners DeForest Hulburd and Hugh McBirney Johnston as trustees under said will also are and comprise all the legatees and devisees under said will except the beneficiaries of the trust estates created under said will, which trust estates are held by said Hugh McBirney Johnston, as such trustee and said DeForest Hulburd and Hugh McBirney Johnston, as such [fol. 6] trustees, respectively). The residence of the petitioner DeForest Hulburd is Lake Forest, Illinois. The residence of the petitioner Hugh McBirney Johnston is 1425 North State Street, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to Estate of Charles H. Hulburd on October 27, 1926.

3. The taxes in controversy are income and profit taxes for the fiscal year ended September 30, 1919. The Commissioner proposes to assess Estate of Charles H. Hulburd as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois, in the amount of $24,000.00.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that a gain resulted to the Van Sicklen Company by reason of the receipt by it for distribution among its stockholders, of no par value stock of the Van Sicklen Speedometer Company.

(b) The Commissioner erred in determining that such no par value stock had a fair market value of $30.00 per share.

(c) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd as a transferee of the property of Van Sicklen Company.

(d) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd because the period of limitation for assessment against Estate of Charles H. Hulburd had expired.

(e) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because no property of the Van Sicklen Company was at any time a part of or included in

Estate of Charles H. Hulburd, or was possessed by said Charles H. Hulburd at the time of his death, or was transferred to or received by your petitioners as such executors.

(f) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because said estate has been wholly distributed and settled and your petitioners duly discharged as executors thereof.

(g) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because said estate is not liable in law or equity in respect of said tax.

(h) The Commissioner erred in adding the sum of $49,653.30 penalty to the amount of the deficiency alleged to be due from the Van Sicklen Company.

(i) The Commissioner erred in proposing to assess Es- [fol. 7] tate of Charles H. Hulburd and the various former stockholders of the Van Sicklen Company for amounts which aggregate more than the total amount claimed to be due from the Van Sicklen Company.

(j) The Commissioner erred in proposing to assess and collect from Estate of Charles H. Hulburd a sum representing tax claimed to be due, plus a penalty, because there is no liability either at law or in equity on the part of Estate of Charles H. Hulburd for alleged false and fraudulent statement with intent to evade the tax, made by the Van Sicklen Company, and neither said Estate of Charles H. Hulburd, nor the petitioners at any time had any knowledge of any such alleged false and fraudulent statements on the part of said corporation.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) Estate of Charles H. Hulburd was wholly distributed by the petitioners as executors of the will of Charles H. Hulburd (a copy of which is attached and marked Exhibit "B") prior to February 26, 1926 on which day the Estate of Charles H. Hulburd was declared settled and the petitioners discharged as such executors by the order of the Probate Court of Cook County, Illinois, (a copy of which is attached and marked Exhibit "C").

(b) On or about April 16, 1924, the petitioners as such executors and pursuant to the provisions of section 250 (d)

of the Revenue Act of 1921 in writing requested the Commissioner of Internal Revenue to determine and assess within one year all taxes due on the income received during the lifetime of said decedent. A copy of said written request is attached and marked Exhibit "D". Under date of April 20, 1925, (IT:PA:1; FMA 106) the Commissioner notified the petitioners, as such executors, referring to said written request of April 16, 1924, that, since the Revenue Act of 1924 was then in effect, the case had been closed under Section 277 (a) (3) of that Act. All deficiencies in tax mentioned in said notice of April 20, 1925 have been paid in full and discharged. A copy of said notice of April 20, 1925 is attached and marked Exhibit "E".

(c) The Van Sicklen Company, the taxpayer corporation, was organized October 31, 1913, under the laws of the State of Illinois, and was engaged in the manufacture of speed recording and other devices. It commenced business with an authorized capital stock of $150,000 of which $90,000 par value was paid for in property and remainder [fol. 8] in cash. On May 6, 1915 the authorized capital stock was increased to $250,000 the additional $100,000 par value being subscribed and paid for in cash.

The Company had operated at a loss and it became necessary to reorganize the Company. The total deficit for the years of its operation was $93,568.95. A plan was perfected under which the entire assets of the old company were to be transferred to a new company, in return for 5,000 shares of no par value capital stock in the new company and $250,000 in cash, which stock and cash were in turn to be divided among the stockholders of the old company. Each stockholder of the old company having a share of capital stock of $100 par value, received two shares of stock without par value in the new company. As a part of the plan of reorganization, the old corporation passed out of existence and was dissolved.

The new corporation was called the Van Sicklen Speedometer Company and was incorporated July 25, 1919, under the laws of the State of Delaware with an authorized capital of 25,000 shares of no par value common stock. The ten shares of stock subscribed for by the incorporators were paid for in cash at $100 per share.

On August 4, 1919, Chester H. Braselton, one of the reorganizers of the Van Sicklen Company, acting as trustee,

subscribed for 3500 shares of no par value capital stock of the Van Sicklen Speedometer Company and paid therefor in cash, the sum of $350,000 of which $250,000 was used to meet the cash payment above referred to.

Norman W. Church subscribed for 1,000 shares of stock in the new company, giving his note of $100,000 in payment therefor and an additional 2500 shares in the new company were issued to Mr. Church in consideration of his transferring to it, an option on the assets of the old company.

On August 9, 1919, the Van Sicklen Speedometer Company exercised the option to purchase the Van Sicklen Company assets and to assume all liability and paid therefor the sum of $250,000 in cash and 5,000 shares of its no par value common stock. On August 9, 1919, 12010 shares of stock in the new company had been issued.

On or about August 9, 1919, the capital stock of the Van Sicklen Speedometer Company had not been offered to the public in any manner whatsoever; had not been listed on any exchange; had not been bought or sold under private sale and the only purchasers of the stock were those who [fol. 9] had purchased as subscribers, for the purpose of furnishing capital to the new company.

The 5,000 shares of no par value common stock of the Van Sicklen Speedometer Company which were received by the Van Sicklen Company for the purpose of distributing the same to its stockholders, had no fair market value on August 9, 1919.

The return filed by the taxpayer corporation was made in good faith and contained no false or fraudulent statements, with intent to evade the tax.

(d) No property of the Van Sicklen Company that may have been distributed to Charles H. Hulburd, as a stockholder thereof, was possessed by said Charles H. Hulburd at the time of his death, or was transferred to or received by your petitioners as such executors, or was at any time a part of or included in the Estate of Charles H. Hulburd, deceased.

Wherefore, petitioners pray that this Board may hear the proceeding; and that the proposal of the Commissioner to assess Estate of Charles H. Hulburd in the sum of $24,000.00 be dismissed, or in the alternative that the tax deficiency of the Van Sicklen Company be redetermined

on the basis that no taxable gain resulted by reason of the receipt of 5,000 shares of no par value common stock in Van Sicklen Speedometer Company; and that the penalty be eliminated; and that petitioners may have such other and further relief as may be just; and your petitioners, as executors and trustees as aforesaid, submit their rights and interests in the matter of the taxes and penalties in controversy to the tender consideration and protection of this Board.

Henry A. Gardner, Alfred T. Carton, Counsel for Petitioners. 1030 First National Bank Building, Chicago, Illinois.

Duly sworn to by DeForest Hulburd and Hugh Johnston. Jurat omitted in printing.

[fol. 10] BEFORE U. S. BOARD OF TAX APPEALS

AMENDED PETITION—Filed Nov. 30, 1928

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue, in his notice of deficiency (IT:E:RR: 280-60D), dated October 27, 1926 to Estate of Charles H. Hulburd. The petitioners as a basis for their proceeding make the following allegations, those contained in paragraphs 4 and 5 being made upon information and belief:

1. The petitioners are the persons appointed executors in the will of Charles H. Hulburd, late of Chicago, Cook County, Illinois, deceased, and Letters Testamentary were issued to them by the Probate Court of Cook County, Illinois, February 20, 1924. (The Petitioner DeForest Hulburd individually, the petitioner Hugh McBirney Johnston as trustee under said will, and the petitioners DeForest Hulburd and Hugh McBirney Johnston as trustees under said will also are and comprise all the legatees and devisees under said will except the beneficiaries of the trust estates created under said will, which trust estates are held by said Hugh McBirney Johnston, as such trustee and said DeForest Hulburd and Hugh McBirney Johnston, as such trustees, respectively.) The residence of the petitioner DeForest Hulburd is Lake Forest, Illinois. The residence

of the petitioner Hugh McBirney Johnston is 1425 North State Street, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to Estate of Charles H. Hulburd on October 27, 1926.

4. The taxes in controversy are income and profits taxes [fol. 11] for the fiscal year ended September 30, 1919. The Commissioner proposes to assess Estate of Charles H. Hulburd as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois, in the amount of $24,000.00.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that a gain resulted to the Van Sicklen Company by reason of the receipt by it for distribution among its stockholders, of no par value stock of the Van Sicklen Speedometer Company.

(b) The Commissioner erred in determining that such no par value stock had a fair market value of $30.00 per share.

(c) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd as a transferee of the property of Van Sicklen Company.

(d) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd because the period of limitation for assessment against Estate of Charles H. Hulburd had expired.

(e) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because no property of the Van Sicklen Company was at any time a part of or included in Estate of Charles H. Hulburd, or was possessed by said Charles H. Hulburd at the time of his death, or was transferred to or received by your petitioners as such executors.

(f) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because said estate has been wholly distributed and settled and your petitioners duly discharged as executors thereof.

(g) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because said estate is not liable in law or equity in respect of said tax.

(h) The Commissioner erred in adding the sum of $49,633.30 penalty to the amount of the defciency alleged to be due from the Van Sicklen Company.

(i) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd and the various former stockholders of the Van Sicklen Company for amounts which aggregate more than the total amount claimed to be due from the Van Sicklen Company.

(j) The Commissioner erred in proposing to assess and collect from Estate of Charles H. Hulburd a sum representing tax claimed to be due, plus a penalty, because there is no liability either at law or in equity on the part of Estate [fol. 12] of Charles H. Hulburd for alleged false and fraudulent statement with intent to evade the tax, made by the Van Sicklen Company, and neither said Estate of Charles H. Hulburd, nor the petitioners at any time had any knowledge of any such alleged false and fraudulent statements on the part of said corporation.

(k) The Commissioner erred in holding that Charles H. Hulburd received assets of the Van Sicklen Company, in the amount of the fair market value of $24,000.00.

(l) The Commissioner erred in failing to hold that the Statute of Limitations bars any assessment against the petitioners.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) Estate of Charles H. Hulburd was wholly distributed by the petitioners as executors of the will of Charles H. Hulburd (a copy of which is attached and marked Exhibit "B") prior to February 26, 1926 on which day the Estate of Charles H. Hulburd was declared settled and the petitioners discharged as such executors by the order of the Probate Court of Cook County, Illinois; (a copy of which is attached and marked Exhibit "C").

(b) On or about April 16, 1924, the petitioners as such executors and pursuant to the provisions of section 250 (d) of the Revenue Act of 1921 in writing requested the Commissioner of Internal Revenue to determine and assess within one year all taxes due on the income received during the lifetime of said decedent. A copy of said written re-

quest is attached and marked Exhibit "D". Under date of April 20, 1925 (IT:PA:1; FMA 106), the Commissioner notified the petitioners, as such executors, referring to said written request of April 16, 1924, that, since the Revenue Act of 1924 was then in effect, the case had been closed under Section 277 (a) (3) of that Act. All deficiencies in tax mentioned in said notice of April 20, 1925 have been paid in full and discharged. A copy of said notice of April 20, 1925 is attached and marked Exhibit "E".

(c) The Van Sicklen Company, the taxpayer corporation, was organized October 31, 1913, under the laws of the State of Illinois, and was engaged in the manufacture of speed recording and other devices. It commenced business with an authorized capital stock of $150,000 of which $90,000 par value was paid for in property and remainder in cash. On May 6, 1915 the authorized capital stock was increased to $250,000 the additional $100,000 par value being subscribed and paid for in cash.

[fol. 13] The Company had operated at a loss and it became necessary to reorganize the Company. The total deficit for the years of its operation was $93,568.95. A plan was perfected under which the entire assets of the old company were to be transferred to a new company, in return for 5,000 shares of no par value capital stock in the new company and $250,000 in cash, which stock and cash were in turn to be divided among the stockholders of the old company. Each stockholder of the old company having a share of capital stock of $100 par value, received two shares of stock without par value in the new company. As a part of the plan of reorganization, the old corporation passed out of existence and was dissolved.

The new corporation was called the Van Sicklen Speedometer Company and was incorporated July 25, 1919, under the laws of the State of Delaware with an authorized capital of 25,000 shares of no par value common stock. The ten shares of stock subscribed for by the incorporators were paid for in cash at $100 per share.

On August 4, 1919, Chester H. Braselton, one of the reorganizers of the Van Sicklen Company, acting as trustee, subscribed for 3500 shares of no par value capital stock of the Van Sicklen Speedometer Company and paid therefor in cash, the sum of $350,000 of which $250,000 was used to meet the cash payment above referred to.

Norman W. Church subscribed for 1,000 shares of stock in the new company, giving his note of $100,000 in payment therefor and an additional 2500 shares in the new company were issued to Mr. Church in consideration of his transferring to it, an option on the assets of the old company.

On August 9, 1919, the Van Sicklen Speedometer Company exercised the option to purchase the Van Sicklen Company assets and to assume all liability and paid therefore the sum of $250,000 in cash and 5,000 shares of its no par value common stock. On August 9, 1919, 12,010 shares of stock in the new company had been issued.

On or about August 9, 1919, the capital stock of the Van Sicklen Speedometer Company had not been offered to the public in any manner whatsoever; had not been listed on any exchange; had not been bought or sold under private sale and the only purchasers of the stock were those who had purchased as subscribers, for the purpose of furnishing capital to the new company.

The 5,000 shares of no par value common stock of the Van Sicklen Speedometer Company which were received by [fol. 14] the Van Sicklen Company for the purpose of Distributing the same to its stockholders, had no fair market value on August 9, 1919.

The return filed by the taxpayer corporation was made in good faith and contained no false or fraudulent statements, with intent to evade the tax.

(d) No property of the Van Sicklen Company that may have been distributed to Charles H. Hulburd, as a stockholder thereof, was possessed by said Charles H. Hulburd at the time of his death, or was transferred to or received by your petitioners as such executors, or was at any time a part of or included in the Estate of Charles H. Hulburd, deceased.

(e) Charles H. Hulburd was not the transferee of property of the Van Sicklen Company of the fair market value of $24,000.00.

(f) The Statute of Limitations bars any assessment against the petitioners for the reason that the alleged deficiency letter does not extend the Statute of Limitations. The said 60-day letter, a true copy of which is annexed hereto is addressed to "Estate of Charles H. Hulburd", there is no entity in law or equity of that name and hence

petitioners submit to this honorable Board whether the said 60-day letter has conferred jurisdiction on this honorable Board and has extended the Statute of Limitations for assessment against these petitioners.

Wherefore, petitioners pray that this Board may hear the proceeding; and that the proposal of the Commissioner to assess Estate of Charles H. Hulburd in the sum of $24,000.00 be dismissed, or in the alternative that the tax deficiency of the Van Sicklen Company be redetermined on the basis that no taxable gain resulted by reason of the receipt of 5,000 shares of no par value common stock in Van Sicklen Speedometer Company; and that the penalty be eliminated; and that petitioners may have such other and further relief as may be just; and your petitioners, as executors and trustees as aforesaid, submit their rights and interests in the matter of the taxes and penalties in controversy to the tended consideration and protection of this Board.

(Sgd.) John E. Hughes, (Sgd.) Alfred T. Carton,
(Sgd.) Henry A. Gardner, Counsel for Petitioners.
1030 First National Bank Building, Chicago, Illinois.

[fol. 15] *Duly sworn to by DeForest Hulburd. Jurat omitted in printing.*

EXHIBIT "A" TO AMENDED PETITION

Form NP-2

Office of Commissioner of Internal Revenue, Treasury Department, Washington

October 27, 1926.

IT:E:RR:280-60D
JSR.

Estate of Charles H. Hulburd,
c/oor DeForest Hulburd,
86 East Randolph Street, Chicago, Illinois.

SIRS:

As provided by Section 280 of the Revenue Act of 1926, there is proposed for assessment against the estate the sum of $24,000.00 constituting its liability as a transferee

of the assets of the Van Sicklen Company, Elgin, Illinois, representing unpaid income and profits taxes assessed against the company for the fiscal year ended September 30, 1919, in accordance with the attached statement, plus any penalty and accrued interest.

In accordance with the provisions of Section 274 of the [fol. 16] Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. Blair, Commissioner, By (signed) C. D. Nash,
Assistant to the Commissioner.

Inclosures: statement. Form A.

Statement.

IT:E:RR:-280
JSR:60D

Income.

Net income as determined by Revenue Agent's report dated September 24, 1924		$441,532.19
Add: Error of $5,244.75 made by Revenue Agent, due to reserve for bad debts		5,244.75
Total		$446,776.94
[fol. 17] Less: Value of 5,000 shares of no par value of The Van Sicklen Speedometer Company, determined by Revenue Agent	$321,700.	
Value of $5,000 shares of stock at $30 per share	150,000.	
		171,700.00
Net income adjusted		$275,076.94

Invested Capital.

Capital stock, $215,000.00 effective for 360/365	246,575.34

After careful consideration of the information submitted, your corporation has been allowed assessment under Sections 327 and 328 of the Revenue Act of 1918 for the period ended September 30, 1919.

Computation of Tax.

Profit tax, Section 328, 1918 rates	$142,018.41
Profit tax, Section 328, 1919 rates	60,410.20

Summary of Taxes.

That proportion of the profits tax computed at the 1918 rates, which the number of months in 1918 is of the months in the period—92/360 of $142,018.41.			$36,293.59
That proportion of the profits tax computed at the 1919 rates, which the number of months in 1919 is of the months in the period—268/360 of $60,410.20			44,972.04
Total excess and war profits tax			$81,265.63
[fol. 18] Brought forward			$81,265.63
Net Income		$275.076.94	
Less: Profits tax	$81,265.63		
Exemption	2,000.00	83,265.63	
Balance subject to tax at 12% and 10%		$191,811.31	
Amount of tax at 12%		23,017.36	
Amount of tax at 10%		19,181.13	
That proportion of the tax computed at 12%, which the number of months in 1918 is of the months in the period—92/360 of $23,017.36			5,882.22
			$87,147.85
That portion of the tax computed at 10% which the number of months in 1919 is of the months in the period 268/360 of $19,181.13			14,279.81
Correct tax liability			$101,427.66
Penalty as provided in Section 250(b) of the Revenue Act of 1918			49,653.30
Total tax plus penalty			$151,080.96
Previously assessed:			
Deficiency			$227,872.06
Penalty			113,936.03
Original tax #400201			2,121.06
			$343,929.15

Correct tax liability and penalty as shown above	$151,080.96
Overassessment	$192,848.19
Correct deficiency in tax	$101,427.66
Correct penalty	49,653.30
Total	$151,080.96
Less: Tax assessed on return #400201	2,121.06
Deficiency in tax plus penalty	$148,959.90

[fol. 19] EXHIBIT "B" TO AMENDED PETITION

Last Will and Testament of Charles H. Hulburd

I, Charles H. Hulburd, of the City of Chicago, County of Cook and State of Illinois, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking and annulling any and all former wills by me made.

First: I direct my Executors, hereinafter named, to pay, as soon after my decease as practicable, out of my general estate, all my just debts and funeral expenses and all inheritance taxes, socalled, upon my estate and upon each and every bequest of this, my Will.

Second: I give, devise and bequeath unto my son, De Forest Hulburd, the following described premises, in the City of Chicago, County of Cook and State of Illinois, to-wit:

That part of Lot twentynine (29) in the Subdivision of the South Half (S.½), excepting the West (W) One Hundred Thirtytwo and fivetenths (132.5) feet of said Sourh Half (S½) of Original Block One (1) in Canal Trustees' Suddivision of the South (S) fractional Quarter (¼) of Section Three (3) in Township Thirtynine (39) North Range Fourteen (14) East of the Third Principal Meridian, as shown upon a corrected plat of the Subdivision aforesaid by George P. A. Healy, which was recorded in Book 18 of Plats, page 28, described as follows:

Commencing at the Northeast (NE) corner of said Lot on the West (W) line of Lake Shore Drive; thence Southeast-

erly (SE'ly) along said West (W) line of said Lake Shore Drive, Thirtyseven and eight tenths (37.8) feet; thence West (W) on a line parallel to the North (N) line of said Lot to a point Twelve (12) feet East (E) of the East (E) line of Lot Twentyeight (28) in said Subdivision; thence North (N) on a line parallel with the West (W) line of said Lot Twentynine (29) to the North (N) line of said Lot Twentynine (29); thence East (E) on the North (N) line of said Lot Twentynine (29), One Hundred Fourteen (114) feet, more or less, to the place of beginning.

Commencing on the East (E) line of said Lot Twentynine (29) Thirtyseven and eight tenths (37.8) feet Southeast [fol. 20] (SE) of the Northeast (NE) corner thereof measured along the West (W) line of Lake Shore Drive; thence West (W) on a line parallel to the North (N) line of said Lot to a point Twelve (12) feet East (E) of the East (E) line of Lot Twentyeight (28) in said Subdivision; thence North (N) One (1) foot more or less, to the Southeast (SE) Corner of a tract of land conveyed to the City of Chicago for public alley purposes by Julian W. Mack and wife by deed, dated June 4, 1901; thence West (W) Twelve (12) feet along the South (S) line of said tract of land so conveyed to the City of Chicago to the East (E) line of said Lot Twentyeight (28); thence South (S) on the East (E) line of said Lot Twentyeight (28) to the point of intersection of said Lot Twentyeight (28) by the North (N) line of the South (S) Fortynine (49) feet, measured on the Lake Shore Drive, of said Lot Twentynine (29); thence East (E) on the North (N) line of said South (S) Fortynine (49) feet, so measured, of said Lot Twentynine (29) to a point on the West (W) line of the Lake Shore Drive Fortynine (49) feet Northwesterly (NW'ly) of the Southeast (SE) corner of said Lot Twentynine (29); thence Northerly (N'ly) along the West (W) line of said Lake Shore Drive to the place of beginning.

Said premises being all the real estate owned by me on Lake Shore Drive, known as Number 1138 Lake Shore Drive, and occupied by me as a homestead.

together with all and singular the buildings, improvements, household goods and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, for his sole use and benefit absolutely.

Third: I give and bequeath unto my said son, De Forest Hulburd, all the jewelry, wearing apparel, personal effects and automobiles which I may possess at the time of my death.

Fourth: I give and bequeath all the stock of Union Special Machine Company of which I may die possessed to my son-in-law, Hugh McBirney Johnston, and to his successor and successors, in trust, to hold the same upon the following trusts, that is to say:

(a) In each year until the youngest of the children of my daughter, Ethel Hulburd Johnston, viz., Hulburd Johnston, Mary Elizabeth Johnston, Hugh McBirney Johnston, Jr., and Ethel De Forest Johnston, shall reach the age of twentyone (21) years, my said Trustee shall use the annual net income of the trust estate for the benefit of said [fol. 21] children or the survivor thereof, in equal shares, expending so much of each child's share for his or her education, support and maintenance during minority, as my Trustee, in his discretion, may deem necessary or proper, and paying to each child, in convenient installments, in each year after he or she shall reach his or her majority, his or her share of such net annual income. If any child shall die prior to the time for distribution of said trust estate as hereinafter provided, leaving issue him or her surviving, I direct that my Trustee shall use the share of such deceased child for the benefit of the issue of said deceased child.

(b) When the youngest of said children, or the survivors thereof, shall reach the age of twenty-one (21) years, my Trustee shall divide the trust estate, with any and all income therefrom, accrued but unpaid, and with all accumulations thereto of every kind and nature, into as many equal share as there may be children surviving and deceased children leaving issue him or her surviving. My Trustee shall convey and transfer one such share to each child then surviving, and one share to the issue of any such deceased child, it being my intention that the issue of any deceased child shall receive the share of his or her or their deceased parent, in equal shares.

Fifth: I give, devise and bequeath one half of the rest, residue and remainder of my estate, of whatever kind and

nature and wherever situated to my son, De Forest Hulburd. If my said son shall not be living at the time of my death, I give, devise and bequeath said one half of the rest, residue and remainder of my estate to John Gillies, of Chicago, Illinois, and to his successor and successors, in trust, to hold the same upon the following trusts, that is to say:

(a) To pay the income of said trust estate each year, in convenient installments, to the widow of my said son, De Forest Hulburd, as long as she shall live and shall remain unmarried. Upon her death or remarriage, my Trustee shall divide said trust estate into as many equal shares as there may be surviving children, and deceased children leaving issue him or her then surviving, of my said son, DeForest Hulburd, and shall transfer and convey to each surviving child one such share, and to the issue of each deceased child one such share of said trust estate, it being my intention that the issue of each deceased child shall take the share of his or her or their deceased parent in equal shares. If at the time of the death or remarriage of the widow of my [fol. 22] said son there shall be no children of his and no issue of any deceased child of his then living, my Trustee shall divide such trust estate into as many partes as there may be such surviving children and deceased children leaving issue him or her then surviving, of my daughter, Ethel Hulburd Johnston, and shall transfer and convey to each surviving child one such share and to the issue of each deceased child one such share of said trust estate, it being my intention that the issue of each deceased child shall take the share of his or her or their deceased parent in equal shares.

Sixth: I give, devise and bequeath the remaining one-half of the rest, residue and remainder of my estate, of whatever kind and nature and wherever situated, to my son-in-law, Hugh McBirney Johnston, and my son, De Forest Hulburd, and to their successor and successors, in trust, to hold the same upon the following trusts, that is to say:

(a) In each year until the youngest of the children of my daughter, Ethel Hulburd Johnston, viz., Hulburd Johnston, Mary Elizabeth Johnston, Hugh McBirney Johnston, Jr., and Ethel De Forest Johnston, shall reach the age of twenty-one (21) years, my said Trustees shall use the annual net income of the trust estate for the benefit of said

children or the survivors thereof, in equal shares, expending so much of each child's share for his or her education, support and maintenance during minority, as my Trustees, in their discretion, may deem necessary or proper, and paying to each child, in convenient installments in each year after he or she shall reach his or her majority, his or her share of such net annual income. If any child shall die prior to the time for distribution of said trust estate as hereinafter provided, leaving issue him or her surviving, I direct that my Trustees shall use the share of such deceased child for the benefit of the issue of said deceased child.

(b) When the youngest of said children, or the survivors thereof, shall reach the age of twenty-one (21) years, my Trustees shall divide the trust estate, with any and all income therefrom, accrued but unpaid, and with all accumulations thereto of every kind and nature, into as many equal shares as there may be children surviving and deceased children leaving issue him or her surviving. My Trustees shall convey and transfer one such share to each child then surviving, and one share to the issue of any such deceased child, it being my intention that the issue of any such deceased child shall receive the share of his or her or their deceased parent.

[fol. 23] Seventh: My Trustees named in Paragraphs Fourth, Fifth and Sixth hereof shall invest and reinvest the several trust estate and from time to time change any such investments in such manner as they shall deem best, hereby being authorized either to keep the same investments which I shall have at the time of my death or to change them or any of them in any manner in their own sole discretion, and to invest any and all of said trust estates in any real estate, stocks, bonds, mortgages or other securities or property which my said Trustees may deem safe and proper, having regard for the safety of the principal of said investments, regardless of any restrictions imposed upon the investment of trust funds by the statutes of the state of Illinois or any other state in force at the date of my death or at any time thereafter. I hereby give my said Trustees the entire management and control of said several trust estates with full power and authority from time to time to vary the securities and property in which said trust estates may from time to time be invested, and at any time or times to purchase real estate or other

property in the State of Illinois or elsewhere, and to improve in any way, to sell, exchange, lease for any length of time, convey or in any other way dispose of the whole or any portion or portions of the real estate or other property which may at any time be part of the said trust estates or any interest therein on such terms and for such prices as said Trustees may deem best, and for the above purpose to make, execute and deliver any and all contracts, deeds, mortgages, assignments, bills of sale or other instruments necessary or desirable therefor, hereby giving to my Trustees as full and complete power of management and control of the trust property and of the disposition thereof as I would or might have had if I had remained living, Purchasers from the Trustees shall not be required to see to the application of the purchase money and persons dealing with the Trustees shall not be required to see that the terms of this trust are complied with.

Eighth: In the event of the death, resignation, refusal or inability to act of Hugh McBirney Johnston as Trustee under Paragraph Fourth hereof, then and in that event, I hereby nominate and appoint John Gillies as Trustee under said Paragraph Fourth, hereby giving to said John Gillies all the same rights, powers and authority discretionary or otherwise, herein given to the Trustee therein named. And in the event of the death, resignation, refusal or inability [fol. 24] to act of both Hugh McBirney Johnston and DeForest Hulburd as Trustees under Paragraph Sixth hereof, then and in that event, I hereby nominate and appoint John Gillies as Trustee under said Paragraph Sixth, hereby giving to said John Gillies all the same rights, powers and authority, discretionary or otherwise, herein given to the Trustees therein named.

Ninth: I hereby nominate and appoint Hugh McBirney Johnston and DeForest Hulburd as Executors of this, my Will, and direct that they shall not be required to furnish sureties on their bonds as such Executors, I hereby give to my said Executors, or such of them as shall qualify, full right, power and authority to sell, mortgage, exchange or otherwise dispose of any or all of my property, real, personal or mixed, and wheresoever situate, at such time or times for such prices and on such terms as to my said Executors, or such of them as so qualify seem best, and for

any of said purposes to make, execute and deliver any and all deeds, bills of sale, mortgages or other instruments necessary or desirable therefor, and the purchaser or purchasers shall not be required to see to the application of the purchase money.

In case of the death, refusal or inability to act of both of said Executors herein named, I hereby nominate and appoint John Gillies Executor of this, my Last Will and Testament, with the same rights, powers and authority as herein given to the Executors hereinabove named.

In Witness Whereof, I have hereunto set my hand and seal to this, my Last Will and Testament, and signed my name on the margin of each of the eight (8) preceding pages, this Ninth day of September, A. D. 1921.

Charles H. Hulburd (Seal)

The above and foregoing instrument was signed, sealed, published and declared by the Testator, Charles H. Hulburd, as and for his Last Will and Testament in the presence of us, the undersigned, who, in his presence and in the presence of each other, have, at his request, hereunto subscribed our names as witnesses thereto, and have seen him sign his name on the margin of each page except this last page, this 9th day of September, A. D. 1921.

Henry A. Gardner, residing at Winnetka.
Page D. Ballard, residing at Evanston, Ills.
Robert E. Montgomery, residing at Villa Park, Ills.

[fol. 25]

A Codicil

To the Last Will and Testament of

Charles H. Hulburd

I, Charles H. Hulburd, of Chicago, Cook County, Illinois, declare the following to be a Codicil to my Last Will and Testament which bears date the 9th day September, A. D. 1921:

First: Wherever in my said Will (and particularly in Paragraphs Fifth, Eight, and Ninth thereof) I have named and/or appointed John Gillies, late of Chicago, Illinois, deceased, as a Trustee under, or an Executor of, my said Will, I hereby nominate and appoint The Northern Trust Company, a corporation organized under the laws of the State

of Illinois, and located at Chicago, Illinois, its successor and successors, as a Trustee under, or an Executor of, my said Will, as the case may be, in place of the said John Gillies, deceased; hereby giving, devising and bequeathing unto said The Northern Trust Company, and its successor and successors, as such Trustee, all the right, title, interest and estate given, devised and bequeathed in and by said will unto said John Gillies, his successor and successors, or necessary for the execution of the several trust; and hereby giving unto said The Northern Trust Company, as such Trustee or Executor, as the case may be, all the rights, powers and authority, discretionary or otherwise, given in and by said Will to the said John Gillies, as Trustee thereunder or Executor thereof, respectfully.

Second: I ratify and confirm my said Will in all other respects.

In Witness Whereof, I have hereunto set my hand and seal to this Codicil to my Last Will and Testament, this 13th day of October, A. D. 1922.

Charles H. Hulburd (Seal)

The foregoing instrument was on the 13th day of October, A. D. 1922, signed, sealed, published and declared by the said Charles H. Hulburd as and for a Codicil to his Last Will and Testament, in the presence of us, the undersigned, who have, at his request, in his presence, and in the presence of each other, subscribed our names hereto as witnesses this 13th day of October, A. D. 1922.

Alfred T. Carton, residing at Lake Forest, Ills.
W. J. Fitzsimmons, residing at Chicago, Ills.
Page D. Ballard, residing at Evanston, Ills.

[fol. 26] EXHIBIT "C" TO AMENDED PETITION

STATE OF ILLINOIS,
County of Cook, ss:

In the Probate Court of Cook County

In the Matter of The Estate of Charles H. Hulburd, Deceased

This day came Hugh McBirney Johnston and DeForest Hulburd, executors of the last will and testament of Charles

H. Hulburd, deceased, and presented to the court and filed herein their final account with the estate of said decedent, showing that said estate has been fully administered.

And it now appearing to the Court that more than one year has elapsed since the granting of letters testamentary herein; that due notice has been given to all of the heirs at law, legatees and beneficiaries; that all assets of said estate have been collected; that no claims have been filed against said estate; that specific legacies have been paid; that the inheritance tax, Federal estate tax, Income tax, court costs, and all other costs and expenses of administration herein have been paid, and that the balance of said estate has been distributed according to the last will and testament of said decedent, and guardian ad litem consenting to the approval of said final account.

It Is Therefore Ordered by the court that said final account be approved and recorded, that the estate be and it is declared settled and that the executors be and they are hereby discharged.

Dated, February 26, 1925.

Enter:

(Signed) Henry Horner, Judge.

[fol. 27] EXHIBIT "D" TO AMENDED PETITION

Re;IT:R:BGC:S.

April Sixteenth, 1926.

Commissioner of Internal Revenue,
Washington, D. C.

DEAR SIR:

Pursuant to your letter of April 14, 1924, to our attorneys, Messrs. Gardner and Carton, 76 West Monroe Street, Chicago, the undersigned, DeForest Hulburd and Hugh McBirney Johnston, as executors of the will of Charles H. Hulburd, deceased, hereby request that all taxes due on account of income received during the lifetime of said Charles H. Hulburd, deceased, who died January 14, 1924, be determined and assessed within one year, in accordance with the provisions of Section 250 (d) of the

Revenue Act of 1921. A certified copy of our letters testamentary is enclosed herewith.

Yours respectfully,

(Signed) DeForest Hulburd. (Signed) Hugh McBirney Johnston.

Encl.

EXHIBIT "E" TO AMENDED PETITION

Treasury Department, Washington

April 20, 1925.

IT:PA:1
FMA-106

Mr. DeForest Hulburd and Mr. Hugh McBirney Johnston, Executors, Estate of Charles H. Hulburd, % Gardner and Carton, 76 West Monroe Street, Chicago.

SIRS:

Reference is made to your letter dated April 16, 1924 in which you requested that this office determine and assess all taxes due on the income received by the above-named decedent during his life time in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921.

[fol. 28] In reply you are advised that an examination of the returns filed by Charles H. Hulburd for the years 1919 to 1921 inclusive discloses no further adjustments necessary for these years.

The audit of the returns for 1922 and 1923, as made by the Supervising Internal Revenue Agent discloses deficiencies of $804.00 and $472.50 respectively.

The return filed for the period January 1, 1924 to January 14, 1924, the date of the taxpayer's death, has been audited in this office. The correct tax liability is found to be $4,319.68, none of which has been assessed.

You are advised that the deficiencies totalling $5,596.18 will be listed at once for assessment, and you will be furthe advised in a separate communication from this office.

Since the Revenue Act of 1924 is now in effect, the case has been closed under Section 277 (a) (3) of that Act.

Respectfully,

J. G. Bright, Deputy Commissioner, by (signed) A. Lewis, Head of Division.

BEFORE U. S. BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION.—Filed Feb. 1, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1. Admits the petitioners' residence as alleged and that they are the duly appointed executors of the last will and testament of Charles H. Hulburd, Deceased, as alleged in paragraph 1 of the amended petition.

2. Admits the allegations of paragraph 2 of the amended petition.

3. Admits the allegations of paragraph 3 of the amended petition.

4. Denies that the respondent erred as alleged in paragraphs 4 (a) to (l), inclusive, of the amended petition.

5. (c) Admits that the Van Sicklen Company, the tax-[fol. 29] payer corporation, was organized October 31, 1913, as alleged in the amended petition, and was engaged in the manufacture of speed recording and other devices and that it commenced business with an authorized capital stock of $150,000. Except as admitted herein, denies the allegations of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation contained in the taxpayer's amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayers' appeal be denied.

(Signed) C. M. Charest, C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: R. W. Wilson, Special Attorney, Bureau of Internal Revenue.

BEFORE U. S. BOARD OF TAX APPEALS

MOTION TO AMEND ANSWER.—Filed Feb. 18, 1932

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows to the Board:

That the above-stated proceeding has been at issue since the 19th day of February, 1927, when an answer was filed by the respondent in conformity with the Board's Rules of Practice then in effect, and the case has since stood as at issue on the Calendar of the Board. That an Amended Petition was thereafter filed November 28, 1928, copy of which was served on the respondent December 4, 1928; and owner thereto was filed February 1, 1929.

Respondent now desires to amend the aforesaid Answer to Amended Petition to conform to the Revised Rules of Practice of the Board, promulgated under date of February 1, 1931, by adding thereto the following additional paragraphs setting up the grounds for affirmative relief on [fol. 30] which he relies, and praying for such relief as he may be entitled to, under the law, and the evidence to be adduced at the hearing.

Wherefore, it is prayed that the accompanying amendment be allowed.

(Signed) C. M. Charest, C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. R. Johnston, Special Attorney, Bureau of Internal Revenue.

2/27/32.

(Stamp) Granted Feb. 27, 1932 (Signed) Logan Morris, Member U. S. Board of Tax Appeals.

BEFORE U. S. BOARD OF TAX APPEALS

AMENDMENT TO ANSWER TO AMENDED PETITION

Lodged Feb. 18, 1932

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and by leave of the Board, amends the Answer to Amended Petition heretofore filed in the above-stated proceeding by substituting and adding after paragraph two thereof the following paragraphs, and by adding the prayer for relief herein set forth in lieu of the prayer for relief in the aforesaid Answer to Amended Petition:

3. Admits that the taxes in controversy are income and profits taxes for the fiscal year ended September 30, 1919.

Admits that the Commissioner originally proposed to assess the Estate of Charles H. Hulburd, deceased, by virtue of the liability of said decedent as a transferee of the assets and property of the Van Sicklen Company, in the amount of $24,000.00.

4. Denies that error was committed in any respect as alleged in paragraph four of the Amended Petition and the various sub-paragraphs thereof.

5. Admits the following facts only which are alleged in paragraph five of the Amended Petition.

[fol. 31] (c) The Van Sicklen Company, the taxpayer corporation, was organized October 31, 1913, under the laws of the State of Illinois and was engaged in the manufacture of speed recording and other devices. It commenced business with an authorized capital stock of $150,000.00, $90,000.00 paid-in in property and the remainder in cash. On May 6, 1915 the authorized capital stock was increased to $250,000.00, the additional $100,000.00 being subscribed and paid for in cash. * * * That there was an accumulated deficit (without considering the profit in 1919 from the sale of its assets and business) of $93,568.95, but respondent does not have sufficient knowledge of the facts to admit that this deficit arose from operation of the business.

That a plan was perfected under which the entire assets of the old company (the Van Sicklen Company) were to be transferred, and were transferred, to a new company, (the Van Sicklen Speedometer Company), in return for 5,000 shares of its no par value capital stock, and $250,000.00 cash, which stock and cash were in turn to be divided, and were divided, among the stockholders of the old company. Each stockholder of the old company having a share of capital stock of $100.00 par value, received two shares of stock without par value in the new company. As a part of the plan of reorganization, the old corporation, (the Van Sicklen Company), passed out of existence and was shortly thereafetr dissolved.

The new corporation was called the Van Sicklen Speedometer Company and was incorporated July 25, 1919 under the laws of the State of Delaware with an authorized capital of 25,000 shares of no par value common stock.

* * * * * * *

On August 9, 1919, the Van Sicklen Speedometer Company exercised the option to purchase the Van Sicklen Company assets and to assume all liability and paid therefor the sum of $250,000.00 in cash and 5,000 shares of its no par value common stock.

* * * * * * *

Admits that the 5,000 shares of no par value common stock of the Van Sicklen Speedometer Company were received by the Van Sicklen Company for the purpose of distribution to its stockholders, but it is denied that said stock was without market value on August 9, 1919, the effective date of the contract.

Each and every allegation of fact in paragraph five of the Amended Petition not admitted above is denied.

[fol. 32] 6. Denies generally and specifically and every allegation in the Amended Petition, except paragraphs one and two thereof, not herein admitted, qualified or denied.

Further answering and as grounds for affirmative defense respondent says:

7. That heretofore, to-wit, under date of October 14, 1930, the Board promulgated its findings of fact and decision in this proceeding, upon a severance of the issues, as to whether or not the assessment of the liability asserted against the petitioner in this proceeding is barred by the statute of limitations. The findings of fact and decision of the Board in that proceeding are now pleaded in bar to any further redetermination or decision upon the matters of fact and questions of law therein found and decided.

8. That at all times material herein Charles H. Hulburd, petitioner's testator, was the owner of record of 240 shares of the capital stock of the Van Sicklen Company, a corporation under the laws of Illinois, as alleged by petitioner in paragraph five of the Amended Petition; and, upon the aforesaid sale of the assets and business of the Van Sicklen Company in the year 1919 became entitled to receive in liquidation of each share of said capital stock, $100.00 in cash and two shares of no-par value common stock of the aforesaid Van Sicklen Speedometer Company of the value of $100.00 per share. That there was paid and distributed to the said Charles H. Hulburd, in liquidation of his capital stock, $24,000.00 in cash and 160 shares of the no-par com-

mon stock of the Van Sicklen Speedometer Company of the value of $100.00 per share and there was distributed in the liquidation of the capital stock of said Charles E. Hulburd to each, E. A. Hamill and H. A. Ryerson, as assignees of said Charles H. Hulburd, 160 shares of the common no par value capital stock of the Van Sicklen Speedometer Company of the value of $100.00 per share, making, in all, cash in the sum of $24,000.00, and stock consisting of 480 shares of the value of $100.00 per share, distributed to the said Charles H. Hulburd, and/or to his assignees, in the liquidation of 240 shares of the capital stock of the Van Sicklen Company of which said Charles H. Hulburd was the owner of record at the time of the aforesaid distributions and up to the time of the dissolution of said corporation.

9. That the Van Sicklen Company, having disposed of all its assets and property, and having ceased to do business in the year 1919, as alleged by the petitioner in paragraph five of the Amended Petition, was, on the date on which the [fol. 33] "deficiency letter," or notice of liability, was mailed to petitioner, without any assets or property whatever.

10. That the taxes imposed upon the Van Sicklen Company, for which liability is asserted against the petitioner in this proceeding, were accrued at the time of the aforesaid distributions to petitioner's testator and/or to his said assignees, in the liquidation of the aforesaid capital stock of which the petitioner was the owner of record.

Wherefore, it is prayed:

(a) That the Board redetermine the amount of the deficiency in taxes due from the Van Sicklen Company for the taxable year or period involved, as shown by the "deficiency letter" attached to the petition in this proceeding, in the amount determined by the respondent, plus penalty and interest.

(b) That, in addition thereto, the Board determine the correct amount of additional deficiency, plus penalty and interest, arising from the facts herein alleged, to-wit, that the fair value in money or moneys worth of the aforesaid 5,000 shares of the no-par capital stock of the Van Sicklen Speedometer Company, at the time it was received, or was

due to be received, by the Van Sicklen Company was $100.00 per share, whereas the deficiency originally determined is based upon a value of but $30.00 per share for said stock.

(c) That the correct amount of the liability of this petitioner, under Section 280 of the Revenue Act of 1926, arising from the aforesaid transfers and distributions to Charles H. Hulburd, and/or to his assignees, be determined by the Board in the aforesaid amount of cash distributed to said Charles H. Hulburd, plus the fair value in money or moneys worth of the no-par value capital stock of the Van Sicklen Company distributed to him and/or his assignees, as hereinbefore alleged, in liquidation of the capital stock of the Van Sicklen Company of which said Charles H. Hulburd, was at all times the owner of record.

(d) That the respondent may have such other and further relief as he may be entitled to under the law and the evidence.

(Signed) C. M. Charest, C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. R. Johnston, Special Attorney, Bureau of Internal Revenue.

JRJ:LS 2/17/32.

[fol. 34] BEFORE U. S. BOARD OF TAX APPEALS

PETITIONER'S REPLY TO RESPONDENT'S AMENDMENT TO ANSWER TO AMENDED PETITION

Filed at Hearing March 25, 1932

Comes now DeForest Hulburd, as sole surviving executor of the last will and testament of Charles H. Hulburd, Deceased, petitioner herein, by Alfred T. Carton and John E. Hughes, his attorneys, and files the following reply to respondent's amendment to his answer to the Amended Petition.

1. Answering paragraph 7 of the amendment to the said answer, the above named petitioner alleges that the Board has not rendered any final order or decision as in said para-

graph 7 alleged. An opinion has been rendered but no order has been entered upon the records of the Board.

2. Answering paragraph 8 of the amendment to the said answer, the above named petitioner alleges that while it is true that two hundred forty (240) shares of the capital stock of the Van Sicklen Company were issued, and remained standing on the books of said company, in the name of said Charles H. Hulburd, yet in truth and in fact said Charles H. Hulburd never had any beneficial interest in One hundred sixty (160) shares of said Two hundred forty (240) shares, but said One hundred sixty (160) shares were at all times material herein owned Eighty (80) shares thereof by one, Ernest A. Hamill, and Eighty (80) shares by one, Martin A. Ryerson; and said petitioner denies that upon the sale of the assets and business of the Van Sicklen Company in 1919 said Charles H. Hulburd became entitled to receive in liquidation of one One hundred sixty (160) shares any cash or stock whatsoever; and said petitioner also denies that there was paid or distributed to said Charles H. Hulburd in liquidation of said One hundred Sixty (160) shares of capital stock any cash or stock whatsoever.

Petitioner also denies that the stock of the Van Sicklen Speedometer Company had a value of $100 per share at the time of the distribution thereof.

3. Petitioner alleges that during the period of his administration of the estate of Charles H. Hulburd, deceased, in the Probate Court of Cook County, Illinois, and prior to [fol. 35] his discharge as said executor on February 26, 1925, he had no notice or knowledge of any indebtedness of said Charles H. Hulburd to the United States, or of any claim of the United States against said Charles H. Hulburd, arising from the distribution of the assets of the Van Sicklen Company.

4. Answering paragraph 10 of the amendment to the said answer, petitioner says that any penalties imposed upon the Van Sicklen Company were not accrued at the time of the alleged distribution to said Charles H. Hulburd, and he also avers that no penalties were imposed against said corporation prior to the dissolution thereof.

Alfred T. Carton, John E. Hughes, Counsel for Petitioners.

BEFORE U. S. BOARD OF TAX APPEALS

Statement of Evidence

Lodged Sep. 8, 1933

Filed Sep. 27, 1933

The following is a statement of the evidence in the above-entitled cause covering all the material evidence adduced at the hearings before the United States Board of Tax Appeals with reference to the issues involved.

This cause first came on for hearing before the Honorable H. F. Seawell, Member of the United States Board of Tax [fol. 36] Appeals, on April 23, 1930, pursuant to an order of the Board dated March 5, 1930, for a severance of the issues and for hearing, in the first instance, on the question of the statute of limitations. Following this hearing, the Board promulgated its interlocutory Findings of Fact and Opinion wherein it was held that the proposed assessment of deficiency in tax against the Estate of Charles E. Hulburd, deceased, was not barred by the statute of limitations, and it was so adjudged in said interlocutory decision.

Thereafter, on March 21, 1932, the cause came on for further hearing with respect to the remaining issues presented by the pleadings, before the Honorable John M. Sternhagen, Member of the United States Board of Tax Appeals, at Chicago, Illinois, pursuant to notice of hearing theretofore given. It was then agreed by the parties and the Member presiding that they would treat the record, findings of fact and decision, relating to the former hearing as a part of the record then to be considered, since there had been no final judgment entered, and it was then agreed that everything in the case up to the point of final judgment was in it for all purposes unless restricted by order of the Board.

At the first hearing, April 23, 1930, the following stipulation of facts was received in evidence:

STIPULATION OF FACTS

"It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record in local hearing before the Board of United States Tax Appeals, that the following facts are true, for the purpose of this proceeding, provided, however, that this stipula-

tion shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated.

"1. That the Van Sicklen Company of Elgin, Illinois filed its corporation income and profits tax return for the fiscal year as ended September 30, 1919, on December 31, 1919, with the Collector of Internal Revenue at Chicago, Illinois.

"2. That on November 17, 1924, the Commissioner of Internal Revenue duly and regularly assessed additional income and profits taxes against the Van Sicklen Company under the provisions of Section 274(d) of the Revenue Act of 1924, for the fiscal year ended September 30, 1919, in the sum of $227,872.06, and a penalty under the provisions of Section 250(d) of the Revenue Act of 1918, in the sum of $113,936.03, which assessment of additional taxes and pen- [fol. 37] alty has not been paid. That the Van Sicklen Company was duly and legally dissolved.

"3. That the notice of deficiency from which this appeal was taken was mailed on October 27, 1926.

"4. That on the 26th day of February, 1925, DeForest Hulburd and Hugh McBirney Johnston, executors of the last will and testament of Charles H. Hulburd, deceased, filed with the Clerk of the Probate Court of Cook County, Illinois their final account as such executors showing that said estate had been fully administered, and such proceedings were then and there had that said final account was approved and recorded and said executors discharged."

There was received as evidence for the petitioner before the Board, a certified copy of an order of the Probate Court of Cook County, Illinois, true copy of which is attached hereto and made a part hereof. (Pet. Ex. #3).

It was further stipulated as follows:

"It is further stipulated that on April 16, 1924, the executors of the Estate of Charles H. Hulburd addressed and mailed a letter (annexed to the petition) to the Commissioner of Internal Revenue, Washington, D. C., and the Commissioner replied thereto by letter dated April 20, 1925, copy of which is annexed to the original petition in this case."

Thereafter, at a further hearing at Chicago, Illinois, March 21, 1932, before the Honorable John M. Sternhagen, Member, further evidence was adduced as follows:

It was stipulated by counsel for the respective parties that the following facts stated by Mr. Johnston, counsel for the Commissioner in his opening statement were correct.

"As a matter of fact the material facts have been alleged by the petitioners in their amended petition which they filed some time after the original petition was filed, and in the replication which they have filed today. That is that the Van Sicklen Company was a corporation under the laws of Illinois, and that in the year 1919 a plan was evolved for the organization of a new company which was incorporated under the laws of Delaware, which was known as the Van Sicklen Speedometer Company. The Van Sicklen Company sold and transferred its entire assets and going business to the Van Sicklen Speedometer Company, which company agreed to assume its liabilities then appearing on its books. That it was a part of that contract that the Van Sicklen Company was to be dissolved; that the consideration in the [fol. 38] sale was $250,000 cash, which represented $100. per share for each share of stock in the Van Sicklen Company. The Van Sicklen Company had a total capital stock outstanding of $250,000, consisting of 2,500 shares, par value of $100. each. That in addition to the cash, there was issued 5,000 shares of common no-par value stock in the Van Sicklen Speedometer Company which represented two shares of the Van Sicklen Speedometer Company for every share owned in the Van Sicklen Company.

"That Charles H. Hulburd was the owner of record of 240 shares of the capital stock of the Van Sicklen Company, but 160 shares thereof were equitably owned by other parties. That in the distribution of the proceeds of sale a check was made to Mr. Hulburd in the amount of $24,000. and that he, in turn, paid to these other two equitable owners $8,000. each. That a stock certificate was issued first to the Van Sicklen Company for 5,000 shares of common no-par value stock of the Speedometer Company, rather 480 shares as affecting this particular case. Charles H. Hulburd was the owner of record of 240 shares; they made out one certificate for 480 shares first to the Van Sicklen Company; this certificate was endorsed by the pres-

ident of that company to Mr. Hulburd and a few days later, about five or six days later, it was turned back and three certificates were issued of 160 shares each to Mr. Hulburd and these two other parties, Mr. Ryerson and Mr. Hammel, I believe are the names of the two other parties."

The Member: "And that completed the distribution of all of the assets of the Van Sicklen Company?"

Mr. Johnston: "Yes."

The Member: "Did the Van Sicklen Company dissolve shortly thereafter?"

Mr. Johnston: "Yes, in September 1919."

The Member: "In the same year?"

Mr. Johnston: "Yes. This transaction was on August 9th. They had no assets thereafter.

"There are quite a number of these cases that are related, and I have entered into a stipulation with counsel for thirteen of the petitioners, that the Board may find deficiencies in the amount asserted by the Commissioner. Now the amount asserted by the Commissioner in all these cases gives no consideration to the stock, it simply considers the amount of cash which was distributed."

The Member: "Do you mean that the respondent has [fol. 39] measured the liability of each of the transferees of the Van Sicklen Company by the fact they received cash from the Van Sicklen Company and abandoned the liability by reason of the stock they received?"

Mr. Johnston: "Yes. In view of the fact that I have agreed that the Board might enter an order in these other cases on that basis, I feel we should not make fish of one and fowl of another. I feel that we should not contend otherwise in this case."

Thereupon there was received in evidence as Petitioner's Exhibit No. 1, a certified copy of the inventory of the Estate of Charles H. Hulburd, true copy of which is attached hereto and made a part hereof.

There was received in evidence as Petitioner's Exhibit No. 2 a certified copy of the final account of the Executors of the Estate of Charles H. Hulburd, true copy of which is attached hereto and made a part hereof.

There was received in evidence as Petitioner's Exhibit No. 3, a certified copy of an order of the Probate Court of Cook County, Illinois, dated February 25, 1925, true copy of which is attached hereto and made a part hereof.

Thereupon De Forest Hulburd, called as a witness for the petitioners, testified as follows:

That his address was Lake Forest, Illinois.

Q. "Were you one of the executors of the Estate of Charles H. Hulburd?"

A. "Yes, I was."

Witness further testified that he received in the mail a notice then handed to him dated October 27, 1926. That that was the first notice of any claim for taxes against this estate as an alleged transferee, which he received. Thereupon there was received in evidence as Petitioner's Exhibit No. 4 a copy of the sixty-day letter, true copy of which is attached to the petition which is a part of the transcript of the record in this case.

It was agreed by counsel for the respective parties that Hugh McBirney Johnston, one of the former executors and trustees under the will of Charles H. Hulburd, deceased, had departed this life since the filing of the original petition in this case with the Board of Tax Appeals.

[fol. 40] The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the name is approved by the undersigned, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Approved:

(Sgd.) John E. Hughes, Attorney for Respondent on Review.

Approved:

(Sgd.) J. M. Sternhagen, Member, United States Board of Tax Appeals. (S)

PETITIONER'S EXHIBIT 1

STATE OF ILLINOIS,
County of Cook, ss:

IN THE PROBATE COURT OF COOK COUNTY

No. 94909. Docket 228, page 82

In the Matter of the Estate of Charles H. Hulburd, Deceased

An Inventory of Said Estate

Item No.	Personal Property	
	Goods and Chattels:	
1.	Goods and chattels as per bill of appraisement herewith presented, appraised at	$6,410.
	Moneys on Hand and Deposited in Bank:	
2.	Cash on hand at date of death	198.
3.	Balance on deposit in Corn Exchange Bank of Chicago	14,117.74
4.	Balance on deposit in Illinois Merchants Trust Company, Chicago	5,038.75
[fol. 41]		
5.	Balance on deposit in Commercial Bank of Ocala, Florida	799.75
	Accounts Receivable:	
6.	Balance due from Elgin National Watch Company for salary (good)	1,666.67
	Notes Receivable:	
7.	Promissory note of Page D. Ballard dated October 2, 1923 (good)	500.
	Forward	$28,730.91

Item No.		Brought forward	$28,730.91
	Corporate Bonds (Good to the Extent Shown):		
8.	One City Club of Chicago First Mortgage Leasehold 5% Gold Bond, due April 1, 1941. Interest due May 1 and November 1. Coupons due May 1, 1924 and thereafter attached		
	Par Value	500.	
	Market value, at par		500.
9.	Three Chicago Railways Company Purchase Money 5% Gold Bonds, due February 1, 1927. Interest due January 1 and July 1. Coupons due July 1, 1924 and thereafter attached. Two bonds at $1,000 each, and one bond at $500.		
	Par value	2,500.	
	Market value at 45		1,125.
10.	Two Chicago Railways Company Adjustment Income 4% bonds, due February 1, 1927. Interest due May 1. Coupons due May 1, 1922 and thereafter attached. Two bonds at $100 each.		
	Par value	200.	
	Market value at 17		34.
[fol. 42]			
11.	Ten Chicago & Illinois Western Railroad Inc., General Mortgage 6% gold bonds, due 1947. Interest due July 1, 1924 and thereafter attached. Ten bonds at $1,000 each.		
	Par value	10,000.	
	Market value at 70		7,000.

Shares of Corporate Stock:

12. 9430 shares of the capital stock, of Elgin National Watch Company, an Illinois corporation. Par value $25. per share	235,750.
13. 3850 shares of the capital stock of Butler Brothers, an Illinois corporation. Par value $20 per share	77,000.
14. 500 shares of the capital stock of Illinois Merchants Trust Company, an Illinois corporation. Par value $100 per share	50,000.
15. 10 shares of the capital stock of the Corn Exchange National Bank of Chicago. Par value $100 per share	1,000.
16. 180 shares of the capital stock of Dolese & Shepard Company, an Illinois corporation. Par value $100 per share	18,000.
17. 50 shares of the capital stock of Chicago & Illinois Western Railroad Inc., an Illinois corporation. Par value $100 per share	5,000.
18. 1500 shares of the capital stock of Union Special Machine Company, an Illinois corporation. Par value $100 per share	150,000.
Forward	$574,139.91

[fol. 43]

Item No.	Brought Forward	$574,139.91
19. 1,000 shares Arkansas Diamond Corporation (desperate)		1.

Miscellaneous Securities:	
20. 20 shares in the University Auxilliary Association. Par value $100 per share	2,000.
21. 100 perferred shares in The Equitable Land Association of Chicago representing an investment of $10,000 as of April 1, 1899 with interest at 6% per annum on which $11,800 has been paid. (Doubtful)	1.
22. Certificate of Interest as holder of 300 shares of The Corn Exchange National Bank of Chicago, representing 300/30,000 of distribution in liquidation on which $15,000 has been paid. (Doubtful)	1.
23. Membership in the Chicago Board of Trade of the City of Chicago. Market value	3,300.
24. Member's Certificate of Interest in Shoreacres. Face value $1,000	1,000.
25. Four Founder's Certificates of Interest in Shoreacres. Face value $1,000 each. (Doubtful)	1.
26. Membership in South Shore Country Club. Market value	500.
Miscellaneous Personal Property:	
27. Interest as a partner in the firm of Hulburd, Warren & Chandler, Stock Brokers and Commission Merchants, 208 South La Salle Street, Chicago, Illinois. Cash value	104,796.28
28. Interest in Elgin National Watch Company's Pension Fund. Cash value	462.01

[fol. 44]

29.	Dividend from International Harvester Company due January 15, 1924		451.25
	Life insurance Policies on the the Life of Decedent. (Good to the extent shown):		
30.	Seven policies in Connecticut Mutual Life Insurance Co. Four policies for $10,000 each. One policy for $5000. One policy for $4,677. One policy for $323.		
	Face value	$50,000.	
	Less loans	30,550.	19,450.
31.	One policy in Northwestern Mutual Life Insurance Co.		
	Face value	$50,000.	
	Less loans	32,700.	17,300.
32.	Three policies in Mutual Benefit Life Insurance Co. One policy for $25,000. One policy for $15,000. One policy for $10,000.		
	Face value	$50,000.	
	Less loans	33,450.	16,550.
		Forward	$739,953.45

Item No.		Brought Forward	$739,953.45
	Life Insurance Policies on the Life of Decedent. (Good to the extent shown.) (Continued):		
33.	One policy in State Mutual Life Insurance Co. Face value $5,000		5,000.
34.	One policy in Phoenix Mutual Life Insurance Co.		
	Face value	$100,000.	
	Less loans	15,500.	84,500.

[fol. 45]

35. One policy in Massachusetts Mutual Life Insurance Co.		
Face value	$50,000.	
Less loans	9,400.	40,600.
36. One policy in Penn Mutual Life Insurance Co.		
Face value $50,000		50,000.
37. One policy in Berkshire Life Insurance Co. Face value $15,000		15,000.
38. Two policies in Metropolitain Life Insurance Co. One policy for $2,000. One policy for $5,000		7,000.
39. Interest in Board of Trade Mutual Benefit Association		2,492.42
Total Personal Property		$944,545.87

Real Estate

Legal description: That part of Lot twenty-nine (29) in the Subdivision of the South half (except the West one hundred and thirty-two and five-tenths (132-5/10) feet of said South half) of Original Block One (1) in the Canal Trustees' Subdivision of the South fractional quarter of Section Three (3), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian in Cook County, Illinois, as shown upon a corrected plat made by George P. A. Healy recorded in Book 18 of Plats page 28, bounded and described as follows, to-wit: commencing at the North East corner of said Lot twenty-nine (29) on the West line of the Lake Shore Drive; thence South Easterly along the West line of said Drive thirty-seven (37) feet eight and one-half (8½) inches, thence West on a line parallel with the North line of said Lot to a point Twelve (12) feet East of the East line of Lot twenty-eight (28) in said Subdivision by Healy; thence North on a line parallel with the West line of said Lot twenty-nine (29) to the North line of said Lot twenty-nine (29); thence East on the North line of said Lot twenty-nine (29) to the place of beginning;

Also that part of Lot Twenty-nine (29) aforesaid described as follows to-wit: commencing on the East line [fol. 46] of said Lot twenty-nine (29) thirty-seven (37) feet eight and one-half (8½) inches South Easterly of the North East corner thereof measured along the West line of the Lake Shore Drive; thence West on a line parallel to the North line of said Lot twenty-nine (29) to a point twelve (12) feet East of the East line of lot twenty-eight (28) in said Subdivision by Healy; thence North one (1) foot, more or less, to the South East corner of a tract of land conveyed to the City of Chicago for public alley purposes by Julian W. Mack and wife by deed dated June 4, 1901; thence West twelve (12) feet along the South line of said tract of land so conveyed to the City of Chicago to the East line of said Lot twenty-eight (28); thence South on the East line of said Lot twenty-eight (28) to the point of intersection of said Lot twenty-eight (28) by the North line of the South forty-nine (49) feet (measured on the Lake Shore Drive) of said Lot twenty-nine (29); thence East on the North line of said South forty-nine (49) feet (so measured) of said Lot twenty-nine (29) to a point on the West line of the Lake Shore Drive forty-nine (49) feet North Westerly of the South East corner of said Lot twenty-nine (29); thence Northerly along the West line of said Lake Shore Drive to the place of beginning;

Also all the right, title and interest of said Charles H. Hulburd, deceased, in and to all land and premises and the future accretions thereto and the riparian rights incident thereto, both presently and in the future being and lying East of the hereinbefore described parts of said Lot twenty-nine (29) and between the same and Lake Michigan.

Title by deed from Julian W. Mack and wife to Charles H. Hulburd, dated June 3, 1901, and recorded in the Recorder's office of Cook County, Illinois, on June 4, 1901 as document 3110530; by deed from Julian W. Mack and wife to Charles H. Hulburd, dated December 4, 1901 and recorded in said Recorder's office December 24, 1901 in Book 7577 of Records, page 333, as document 3188931; and by deed from Charles A. Plamondon and wife to Charles H. Hulburd, dated February 27, 1906 and recorded in said Recorder's office February 27, 1906 in Book 9422 of records, page 146, as document 3825155. Known as No. 1138 Lake Shore Drive, fronting 72 feet 2¼ inches on Lake Shore

Drive, but with a North and South width of 70 feet 5¼ inches.

Improved with a four story brick dwelling house, and occupied by Charles H. Hulburd, deceased, as a homestead.
[fol. 47] We, De Forest Hulburd and Hugh McBirney Johnston, as Executors of the last will and testament of Charles H. Hulburd, deceased, do hereby certify that the foregoing is a full and perfect inventory of all the estate of said deceased, real, personal, or the proceeds thereof, which has been committed to our superintendence and management, or has come to our hands, possession or knowledge.

(Signed) De Forest Hulburd, (Signed) Hugh McBirney Johnston, As Executors as aforesaid.

Approved in open Court April 30-1924.

Henry Horner, Probate Judge.

Clerk's Certificate

State of Illinois

(Seal of the State of Illinois)

County of Cook, ss:

I, Mitchell C. Robin, Clerk of the Probate Court of Cook County and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the annexed and foregoing to be a true and correct copy of Inventory approved herein on the 30th day of April, A. D. 1924 in the matter of the estate of Charles H. Hulburd deceased as appears from the original on file and from the records of the Probate Court in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court, at my office, in the City of Chicago, in said County, this 24th day of March, 1932.

Mitchell C. Robin, Clerk of the Probate Court.
(Seal.)

[Endorsed:] Probate Court of Cook County, Illinois. In the Matter of the Estate of —— ——. Mitchell C. Robin, Clerk.

[fol. 48] PETITIONER'S EXHIBIT 2

STATE OF ILLINOIS,
County of Cook, ss:

IN THE PROBATE COURT OF COOK COUNTY

In The Matter of the Estate of Charles E. Hulburd, Deceased

No. 94909
Docket 228, page 82.

Final Account

And now come De Forest Hulburd and Hugh McBirney Johnston, Executors of the last will and testament of Charles H. Hulburd, deceased, and present their Final Account as such Executors, wherein they charge themselves as follows:

Receipts

Inventory Item		
2.	Cash on hand at date of death	198.
3.	Cash on deposit Corn Exchange National Bank of Chicago	14,117.74
4.	Cash on deposit Illinois Merchants Trust Company, Chicago, and interest	5,052.31
5.	Cash on deposit Commercial Bank of Ocala, Florida	799.75
6.	Cash From Elgin National Watch Co.	1,666.67
7.	Cash from Page Ballard in part payment note	200.
11.	Cash from sale 10 Chicago & Illinois Western Railroad Inc. bonds	8,840.
13.	Cash from sale 25 share Elgin National Watch Co.	1,181.11
17.	Cash from sale 50 Shares Chicago & Illinois Western Railroad, Inc.	500.
	Forward	$32,555.58

[fol. 49]

Inventory Item		
	Brought Forward	$32,555.58
26.	Cash for membership in South Shore Country Club	518.33
23.	Cash from sale Chicago Board of Trade membership	3,300.
27.	Cash from Hulburd, Warren & Chandler in liquidation of partnership, with interest to March 6, 1924	103,614.14
24.	Cash for member's certificate Shoreacres	1,300.
28.	Cash from Elgin National Watch Company's Pension Fund	462.01
29.	Cash from International Harvester Co.	451.25
30.	Cash from Connecticut Mutual Life Insurance Co. on insurance policies	20,354.98
31.	Cash from Northwestern Mutual Life Insurance Co. on insurance policy	26,274.09
		188,830.38
32.	Cash from Mutual Benefit Life Insurance Co. on insurance policies	16,063.84
33.	Cash from State Mutual Life Insurance Co. on insurance policy	6,247.45
34.	Cash from Phœnix Mutual Life Insurance Co. on insurance policy	84,519.05
35.	Cash from Massachusetts Mutual Life Insurance Co. on insurance policy	41,606.13
36.	Cash from Penn Mutual Life Insurance Co. on insurance policy	50,578.
37.	Cash from Berkshire Life Insurance Co. on insurance policy	15,256.35

[fol. 50]

38.	Cash from Metropolitan Life Insurance Co. on insurance policies	7,000.
39.	Cash from Board of Trade Mutual Benefit Association	2,492.42
21.	Cash on account of liquidation of 100 preferred shares The Equitable Land Association of Chicago	2,750.

Inventory Item		
13. Cash dividends on 3850 shares capital stock Butler Brothers		12,031.25
12. Cash dividend on 25 shares Elgin National Watch Co.		12.50
Forward		$427,387.37
Brought Forward		$427,387.37
12. Cash dividends on 9405 shares Elgin National Watch Co.		$70,537.50
14-15. Cash dividend on 510 shares Illinois Merchants Trust Company (10 shares received in exchange for 10 shares Corn Exchange National Bank)		10,200.
20. Cash dividends on 20 shares The University Auxilliary Association		100.
8. Cash interest on City Club bond		25.
11. Cash interest on Chicago & Illinois Western Railroad, Inc., bonds		450.
		508,699.87
9. Cash interest on Chicago Railways Co. P. M. 5% bonds		125.
10. Cash interest on Chicago Railways Co. Adj. 4% bonds		24.
Cash return premiums on automobile, burglary and fire insurance		246.09
[fol. 51]		
Cash executor's fee Zerbrugg Estate		18.23
Cash refund federal estate tax Lois Culver Estate		224.72
Cash interest on account with Illinois Merchants Trust Company		268.01
Cash received on sale $50,000 U. S. certificates of indebtedness	$50,983.52	
Less cost of same	50,766.32	
Profit on investment	217.20	
Interest coupons cashed	1,093.75	
		1,310.95

Inventory Item			
	Cash interest on loan of $73,766 to De Forest Hulburd, March 6 to December 29, 1924		4,044.81
	Cash received in distribution from Hulburd, Warren & Chandler (in liquidation)	568.11	
	Less exchange on check	.05	
			568.06
	Total Cash Receipts		$515,529.74
	Brought Forward		$515,529.74
	Property and Securities Not Sold But Distributed Under the Will at Inventory Value:		
1.	Goods and chattels as per bill of appraisement	$6,410.	
9.	Three Chicago Railways Company Purchase Money 5% gold bonds, face value $2,500 at 45	1,125.	
10.	Two Chicago Railways Company Adjustment Income 4% bonds, face value $100 each, at 17	34.	
12.	9405 shares Elgin National Watch Co. at par	235,125.	
[fol. 52]			
13.	3850 shares Butler Brothers at par	77,000.	
14-15.	510 shares Illinois Merchants Trust Company (10 shares received in exchange for 10 shares Corn Exchange National Bank of Chicago) at par	51,000.	
16.	180 shares Dolese & Shepard Co. at par	18,000.	
18.	1500 shares Union Special Machine Co. at par	150,000.	

Inventory Item		
19. 1000 shares Arkansas Diamond Corporation	1.	
20. 20 shares University Auxiliary Association at par	2,000.	
21. 100 prefered shares The Equitable Land Assn. of Chicago	1.	
22. Certificate of interest representing 300/30,000 distribution in liquidation Corn Exchange National Bank	1.	
25. Four Founder's Certificates of Interest in Shoreacres	1.	
Forward	$540,698	$515,529.74
Brought Forward	$540,698.	$515,529.74
Property and Security Not Sold But Distributed Under the Will at an Agreed Valuation As Follows:		
7. Note of Page Ballard for $500 on which $200 has been paid, at	125.	
8. One City Club of Chicago First Mortgage Leasehold Gold Bond, face value $500, at	375.	
Total Value of Securities Received	$541,198.	541,198.
Total Receipts		$1,056,727.74

[fol. 53] And they crave credit and allowance as follows:

Voucher No.	Date 1934		
1.	Jan. 14.	Paid Chicago Examiner for death notice	4.50
2.	" 14.	Paid Chicago Tribune for death notice	7.50

Voucher No.	Date 1924		
3.	"	14.	Paid Chicago Evening Post for death notice ..... .75
4.	"	14.	Paid Chicago Journal for death notice ..... .75
5.	"	14.	Paid Chicago Daily News for death notice 2.75
6.	"	15.	Paid Fred Pamp for salary 87.50
7.	"	19.	Paid Otis Elevator Co. for elevator service ..... 25.
8.	"	21.	Paid Wm. Erby & Son for auto painting ..... 28.
9.	"	22.	Paid Fred Pamp for advances ..... 65.
10.	"	23.	Paid W. J. Fitzsimmons for incidental funeral and household expense ..... 43.
11.	"	28.	Paid Orpha Kendall Holstman for services at funeral ..... 125.
12.	"	30.	Paid Hulburd, Warren & Chandler for insurance 37.45
13.	"	31.	Paid Corn Exchange National Bank for interest 473.60
14.	"	31.	Paid Illinois Merchants Trust Co. for interest 473.61
15.	"	31.	Paid Oberlin Endowment & Building Fund on pledge ..... 1,000.
16.	Feb.	1.	Paid Carrie Silvander for salary Jan. 1, 1924 to Jan. 14, 1924 .... 40.
17.	"	1.	Paid Ellen Johnson for salary Jan. 1, 1924 to Jan. 14, 1924 .... 50.
18.	"	1.	Paid T. Sato for salary Jan 1, 1924 to Jan. 14, 1924, ... 50.
19.	"	1.	Paid Sam Peyton for Salary Jan. 1, 1924 to Jan. 14, 1924, ... 20.
20.	"	1.	Paid W. J. Fitzsimmons for January salary, ... 125.

[fol. 54]

21.	"	4.	Paid C. H. Jordan & Co., undertaker, ... 1,326.50
22.	"	5.	Paid Bowman Dairy Co. for milk, 11.88

Voucher No.	Date 1924		Brought Forward	
23.	Feb.	5.	Paid Marshall Field & Co. for supplies,	3.
24.	"	5.	Paid Dr. J. M. Washburn for services	25.
25.	"	5.	Paid Hutter's Market for meat	64.70
26.	"	5.	Paid Illinois Bell Telephone Co. for service	7.84
27.	"	5.	Paid Bennett & Lindgren for auto supplies	149.10
28.	"	5.	Paid Onwentsia Club for account	5.
29.	"	5.	Paid E. Wienhoeber & Co. for flowers	250.
30.	"	5.	Paid C. Lemke for account	.65
31.	"	6.	Paid Peoples Gas Light & Coke Co. for gas	9.63
32.	"	11.	Paid Morriss Grocery for groceries	11.37
33.	"	11.	Paid Commonwealth Edison Co. for light	8.29
34.	"	13.	Paid Spaulding & Co. for funeral cards	44.
35.	"	13.	Paid Pinkerton National Detective Agency for services	30.20
36.	"	15.	Paid Olson's Hand Laundry Co. for laundry	2.59
37.	"	25.	Paid Andrew R. Williams for notary fees	3.25
38.	"	27.	Paid Hulburd, Warren & Chandler for insurance	37.45
39.	"	28.	Paid Ellen Johnson for note and interest	848.
40.	"	29.	Paid Corn Exchange National Bank for interest	402.80
41.	"	29.	Paid Illinois Merchants Trust Co. for interest	402.78
[fol. 55]				
42.	"	29.	Paid W. J. Fitzsimmons for February salary	125.

Voucher No.	Date 1924			
43.	Mar.	5.	Paid P. J. Carr, County Collector 1923 personal property tax	621.75
44.	"	5.	Paid Thos. Helbing for rubber stamps	2.25
45.	"	5.	Paid Hulburd, Warren & Chandler for rubber stamps	2.
			Brought Forward	
46.	Mar.	7.	Paid Corn Exchange National Bank for note and interest	100,097.22
47.	"	7.	Paid Illinois Merchant Trust Co. for notes and interest	180,756.94
48.	"	7.	Paid Rev. J. G. K. McClure—services at funeral	50.
49.	"	7.	Paid Rev. T. A. Mills—services at funeral	25.
50.	"	11.	Paid Illinois Merchants Safe Deposit Co.—safety box rent	2.
51.	"	13.	Paid Morris G. Leonard, guardian at litem	25.
52.	"	13	Paid Clerk of Probate Court—costs	39.
53.	"	13.	Paid Clerk of Probate Court—costs	22.50
54.	"	13.	Paid Probate Court Reporters	15.
55.	"	13.	Paid Law Bulletin Publishing Co.	5.
56.	"	15.	Paid Collector of Internal Revenue for first installment 1923 federal income tax, (serial No. 306117)	11,446.52
57.	Apr.	1.	Paid W. J. Fitzsimmons for salary for March	125.
58.	"	2.	Paid Mae Thomas for stenography	25.
59.	"	16.	Paid P. J. Carr, County Collector for 1923, real estate tax	4,227.85
60.	"	17.	Paid South Shore Country Club for dues	32.50

[fol. 56]

Voucher No.	Date 1924		
61.	" 21.	Paid Hulburd, Warren & Chandler for revenue stamps on stock transfers	30.
62.	May 1.	Paid W. J. Fitzsimmons for April salary	125.
63.	" 1.	Paid Mae Thomas for stenography	10.
64.	" 27.	Paid Joseph A. Sparks for assessment against stockholders Van Sicklen Speedometer Co. as of August 31, 1919	240.
65.	June 2.	Paid W. J. Fitzsimmons for May salary	125.
66.	" 2.	Paid Mae Thomas for stenography	5.
67.	" 3.	Paid Hulburd, Warren & Chandler for insurance	88.20
68.	" 3.	Paid Graceland Cemetery Co. for care of lot	14.
69.	" 10.	Paid Illinois Merchants Safe Deposit Co. for box rent	8.

Voucher No.	Date 1924	Brought Forward	
70.	June 10.	Paid Collector of Internal Revenue for second installment 1922 federal income tax (serial No. 1165)	5,723.26
71.	" 11.	Paid Art Institute of Chicago on pledge	1,000.
72.	" 30.	Paid W. J. Fitzsimmons for June salary	125.
73	" 30.	Paid Mae Thomas for stenography	5.
74.	July 14.	Paid P. J. Carr, County Collector, for inheritance tax	68,204.05
75.	Aug. 1.	Paid W. J. Fitzsimmons for July salary	125.
76.	" 1.	Paid Mae Thomas for stenography	10.
77.	" 2.	Paid C. D. Summer for inheritance tax transcript	5.

[fol. 57]

Voucher No.	Date 1924		
78.	Aug. 2.	Paid Wm. R. Swissler, guardian ad litem	50.
79.	" 2.	Paid Chicago Inheritance Abstracting Co. for transcript	6.50
80.	" 2.	Paid Clerk of Probate Court—costs	5.
81.	" 2.	Paid Clerk of County Court—fee	10.
82.	Sept. 4.	Paid W. J. Fitzsimmons for August salary	125.
83	" 12.	Paid Collector of Internal Revenue for third installment 1923 federal income tax, (serial No. 717)	8,584.89
84.	Oct. 1.	Paid W. J. Fitzsimmons for September salary	125.
85.	Nov. 1.	Paid W. J. Fitzsimmons for October salary	125.
86.	Dec. 1.	Paid W. J. Fitzsimmons for November salary	125.
87.	" 12.	Paid Collector of Internal Revence for fourth installment 1923 federal income tax, (serial No. 290)	8,584.88
88.	" 19.	Paid Art Institute of Chicago final installment of pledge	1,000
89.	" 27.	Paid DeForest Hulburd for executor's fee	10,000.
90.	" 29.	Paid Ellen Johnson for note and interest	4,963.98
91.	" 29.	Paid Ellen Johnson for note and interest	2,600.00
92.	Dec. 29.	Paid Gall & Co. for headstone	150.
		Brought Forward	
93.	Dec. 29.	Paid Hulburd, Warren & Chandler for share of settlement with J. W. Sanderson, et al	2,701.58
94.	" 29.	Paid Hulburd, Warren & Chandler for interest	145.63
95.	" 29.	Paid Collector of Internal Revenue for federal estate tax	58,881.11

[fol. 58]

Voucher No.	Date 1924		
96.	" 31.	Paid W. J. Fitzsimmons for December salary	125.
	1925		
97.	Jan. 27.	Paid Hugh McBirney Johnston for executor's fee	10,000.
98.	" 27.	Paid W. J. Fitzsimmons for January salary	125.
99.	Feb. 18.	Paid Hulburd, Warren & Chandler for money advanced decedent	22.94
100.	" 18.	Paid Hulburd, Warren & Chandler for revenue stamps on stock transfers	80.64
101.	" 18.	Paid Gardner and Carton for attorneys' fees	10,000.00
102.	" 18.	Paid Department of Health for two death certificates	1.
103.	" 18.	Paid Clerk of County Court for recording inheritance tax receipt	.75
104.	" 18.	Paid Clerk of Probate Court for final costs	59.15
105.	" 18.	Paid W. J. Fitzsim[illegible]s for February salary	125.
106.	" 18.	Paid William France Anderson for guardian ad litem's fee	50.
107.	" 18.	Paid Collectors of Internal Revenue for decedent's federal income for year 1924	4,323.62
108.	" 18.	Paid County Collector as deposit for 1924 personal property tax	1,250.
		Total Cash Disbursements	$474,158.15

Distribution

Delivered to DeForest Hulburd in satisfaction of legacy under paragraph "Third" of will:	
Goods and chattels as per bill of appraisement and inventory	$6,410.

Delivered to Hugh McBirney Johnston, Trustee, in satisfaction of legacy under paragraph "Fourth" of will:		
[fol. 59] 1500 shares of the capital stock of Union Special Machine Company		150,000.
Delivered to DeForest Hulburd, being one-half residuary estate bequeathed to him under paragraph "Fifth" of will:		
Cash	20,685.79	
One Chicago Railways Company Purchase Money 5% gold bond, face value $1,000	450.	
One Chicago Railways Company Adjustment Income 4% bond, face value $100	17.	
One City Club of Chicago First Mortgage Leasehold gold bond, face value $500	375.	
4700 shares capital stock Elgin National Watch Co.	117,550.	
1925 shares capital stock Butler Brothers	38,500.	
255 shares capital stock Illinois Merchants Trust Co.	25,500.	
90 shares capital stock Dolese & Shepard Co.	9,000.	
500 shares capital stock Arkansas Diamond Corporation	.50	
10 shares University Auxiliary Assn.	1,000.	
50 shares The Equitable Land Assn. of Chicago	.50	
Certificate of interest representing 150/30000 distribution in liquidation Corn Exchange National Bank	.50	
Two Founder's Certificates of Interest in Shoreacres	.50	213,079.79

Delivered to Hugh McBirney Johnston and DeForest Hulburd, Trustees, being one-half residuary estate bequeathed to them as trustees under Paragraph "Sixth" of will: Cash	20,685.80	
Note of Page Ballard	125.	
[fol. 60] Two Chicago Railways Company Purchase Money 5% gold bonds, face value $1,500	675.	
One Chicago Railways Company Adjustment Income 4% bond, face value $100	17.	
Forward	21,502.80	369,489.79
Brought Forward	$21,502.80	$369,489.79
4703 shares capital stock Elgin National Watch Co.	117,575.	
1925 shares capital stock Butler Brothers	38,500.	
255 shares capital stock Illinois Merchants Trust Co.	25,500.	
90 shares capital stock Dolese & Shepard Co.	9,000.	
500 shares capital stock Arkansas Diamond Corporation	.50	
10 shares University Auxiliary Assn.	1,000.	
50 shares The Equitable Land Assn. of Chicago	.50	
Certificate of interest representing 150/30,000 distribution in liquidation Corn Exchange National Bank of Chicago	.50	
Two Founder's Certificates of Interest in Shoreacres	.50	213,079.80
Total Property, Cash and Securities Distributed		582,569.59

Recapitulation

Total Cash Received	515,529.74
Total Cash Disbursed	474,158.15
	41,371.59
Total Property and Securities Distributed	541,198.
	$582,569.59

Dated, Chicago, February 19, 1925.

The foregoing is a just, full, true and perfect account of [fol. 61] all moneys and properties received by said executors, and by them paid out and distributed.

(Signed) Hugh McBirney Johnston. (Signed) De Forest Hulburd, Executors of the Will of Charles Hulburd, Deceased.

State of Illinois,
County of Cook, ss:

Hugh McBirney Johnston and De Forest Hulburd, being each first duly sworn, each on oath deposes and says that he has read the foregoing account by them subscribed, and that the same is true in substance and in fact.

(Signed) Hugh McBirney Johnston. (Signed) De Forest Hulburd.

Subscribed and sworn to before me this 24 day of February, A. D. 1925.

(Signed) Alfred T. Carton, Notary Public. (Notarial Seal)

Approved, February 25, 1925.

(Signed) Wm. France Anderson, Guardian ad litem of Hulburd Johnston, Mary Elizabeth Johnston, Hugh McBirney Johnston, Jr. and Ethel DeForest Johnston, minor heirs of said decedent.

Approved in open Court Feby 26, 1925
Henry Horner, Probate Judge.

Final Report

And now come the said Hugh McBirney Johnston and De Forest Hulburd, Executors of the Will of Charles H. Hul-

burd, Deceased, and report to this Honorable Court that the foregoing is a just, full, true and perfect account of all moneyes and properties received by them as such executors and by them paid out and distributed; that the sole assets of said estate consisted of real estate and personal property as per the inventory heretofore filed herein and of the proceeds of sale and collection of personal property and the income thereof as above set out; that all said personal prop-
[fol. 62] erty has been reduced to possession by them as such executors and is accounted for by them above except a note of Page Ballard for an unpaid balance of Three hundred dollars ($300) and interest which has been distributed in kind at an agreed valuation of One hundred and Twenty five dollars ($125); that all federal estate taxes, Illinois inheritance taxes and federal income taxes assessed against said estate have been paid as per vouchers herewith presented, and that said executors have deposited the sum of Twelve hundred and fifty dollars ($1250) with the County Collector of Cook County for the payment of the personal property tax assessed against said estate for the year 1924; that no claims have been filed against said estate; that there has been no change in the heirship of said decedent from the table of heirship on file in said estate, and that Hulburd Johnston, Mary Elizabeth Johnston, Hugh McBirney Johnston, Jr., and Ethel DeForest Johnston, the minor heirs of the decedent, have been notified of this final accounting in accordance with the rules of this Court and that their duly appointed guardian ad-litem has endorsed his approval on the foregoing final account; that, as shown in said final account, said DeForest Hulburd, individually, has retained the goods and chattels of said estate bequeathed to him in paragraph "Third" of the decedent's last will and testament and one-half of the residuary estate bequeathed to him in paragraph "Fifth" of said will, and said Hugh McBirney Johnston, as trustee under said will, has retained the fifteen hundred (1500) shares of the capital stock of the Union Special Machine Company shown in said inventory and bequeathed to him as such trustee under paragraph "Fourth" of said will, and Hugh McBirney Johnston and DeForest Hulburd, as trustees under said will, have retained the remaining one-half of said residuary estate bequeathed to them as such trustees under paragraph "Sixth" of said will; and that the entire net personal estate of the decedent

has been distributed, as set forth in said final account and in accordance with the provisions of said will.

And said Hugh McBirney Johnston and DeForest Hulburd, as executors of the will of Charles H. Hulburd, deceased, pray that their foregoing final account and report be approved and ask to be discharged; all of which is respectfully submitted.

(Signed) Hugh McBirney Johnston, (Signed) DeForest Hulburd, Executors of the Last will and testament of Charles H. Hulburd, Deceased.

[fol. 63] State of Illinois,
County of Cook, ss:

Hugh McBirney Johnston and De Forest Hulburd, being each duly sworn, each on oath says that he has read the foregoing report by them subscribed and that the same is true in substance and in fact.

(Signed) Hugh McBirney Johnston, (Signed) De Forest Hulburd.

Subscribed and sworn to before me this 24 day of February, A. D. 1925. (Signed) Alfred T. Carton, Notary Public. (Notarial Seal.)

(Cut)

State of Illinois,
County of Cook, ss:

I, Mitchell C. Robin, Clerk of the Probate Court of Cook County and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the annexed and foregoing to be a true and correct copy of final account and report approved herein on the 26 day of Feb'y A. D. 1925 in the matter of the estate of Charles H. Hulburd, deceased, as appears from the original on file and from the records of the Probate Court in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court, at my office, in the City of Chicago, in said County, this 24th day of March, A. D. 1932.

Mitchell C. Robin, Clerk of the Probate Court. Court. (Seal.

Probate Court of Cook County, Illinois. In the Matter of the Estate of ——. ——, Attorneys. Mitchell C. Robin, Clerk.

[fol. 64] PETITIONER'S EXHIBIT 3

STATE OF ILLINOIS,
County of Cook, ss:

Be it remembered, That on the 26th day of February A. D. 1925, the same being one of the days of the February Term, 1925, of the Probate Court of Cook County, present thereat:

Honorable Henry Horner, Judge; Peter M. Hoffman, Sheriff; John F. Devine, Clerk.

The following, among other proceedings, were by and before said Court had, and entered of record, to-wit:

In the Matter of the Estate of Charles H. Hulburd, Deceased

This day came Hugh McBirney Johnston and De Forest Hulburd, executors of the last will and testament of Charles H. Hulburd, deceased, and presented to the court and filed herein their final account with the estate of said decedent, showing that said estate has been fully administered.

And it now appearing to the court that more than one year has elapsed since the granting of letters testamentay herein; that due notice has been given to all of the heirs at law, legatees and beneficiaries; that all assets of said estate have been collected; that no claims have been filed against said estate; that specific legacies have been paid; that the Inheritance tax, Federal estate tax, Income tax, court costs and all other costs and expenses of administration herein have been paid, and that the balance of said estate has been distributed according to the last will and testament of said decedent, and guardian ad litem consenting to the approval of said final account.

It is therefore ordered by the court that said final account be approved and recorded, that the estate be and it is declared settled and that the executors be and they are hereby discharged.

[fol. 65] STATE OF ILLINOIS,
County of Cook, ss:

I, John F. Devine, Clerk of the Probate Court of Cook County, in the State aforesaid, do hereby certify that the within is a true transcript of the proceedings had before said Court in the matter of the estate of Charles H. Hulburd, dec'd, entered herein on the 26 day of Feb'y, A. D. 1925.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court at Chicago, in said County, this 24th day of November, A. D. 1926.

John F. Devine, Clerk.

[Endorsed:] Probate Court of Cook County. Estate of Charles H. Hulburd, dec'd. Certified copy of proceedings and order of court. Entered Feb'y 26, 1925. John F. Devine, Clerk.

(Cut)

United States of America

STATE OF ILLINOIS,
County of Cook, ss:

I, John F. Devine, Clerk of the Probate Court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the annexed and foregoing to be a true and correct copy of Order of court entered herein on the 26 day of February, A. D. 1925, in the matter of the estate of Charles H. Hulburd, deceased, as appears from the original on file and from the records of the Probate Court in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Probate Court, at my office in the City of Chicago, in said County, this 24th day of November, A. D. 1926.

John F. Devine, Clerk of the Probate Court. (Seal.)

[fol. 66] STATE OF ILLINOIS,
County of Cook, ss:

I, Henry Horner, Probate Judge of Cook County, and presiding as Judge of the Probate Court of Cook County,

in the State of Illinois, do hereby certify, that John F. Devine, Esq., whose name is subscribed to the foregoing certificate of attestation, now is and was at the time of signing and sealing the same, the Clerk of the Probate Court of Cook County, aforesaid, and keeper of the records, files and seal thereof, duly elected and qualified to office, and that full faith and credit are, and of right ought to be given to all his official acts as such, in all courts of record and elsewhere, and that his said attestation is in due form of law and by the proper officer.

Given under my hand and seal, at Chicago, in said Cook County, this 24th day of November, A. D. 1926.

Henry Horner, Probate Judge of Cook County, Illinois. (Seal.)

Clerk's Certificate of Judge's Certificate

United States of America

STATE OF ILLINOIS,
Cook County, ss:

I, John F. Devine, Clerk of the Probate Court of Cook County, in the State of Illinois (said Court being a Court of Record), do hereby certify that the Honrable Henry Horner, whose name is subscribed to the annexed and foregoing certificate: was, at the time of the signing thereof, and now is, the Probate Judge of said Cook County, and sole presiding Judge of said Probate Court, duly elected commissioned and qualified, and that his said signature is genuine.

In witness whereof, I have signed my name and affixed the seal of said Probate Court, at my office, in the City of Chicago, in said Cook County, this 24th day of November, 1926.

John F. Devine, Clerk.

Probate Court of Cook County, Illinois. In the Matter of the Estate of —— ——. —— ——, Attorneys. John F. Devine, Clerk.

[fol. 67] BEFORE U. S. BOARD OF TAX APPEALS

Findings of Fact and Opinion

Filed Oct. 14, 1930 (on Question of Statute of Limitations)

Promulgated October 14, 1930

In the circumstances of the instant case, held, the proposes assessment against the estate of Charles H. Hulburd, deceased, as a transferee of assets of the Van Sicklen Company is not barred by the statute of limitations provided by section 280 of the Revenue Act of 1926.

John E. Hughes, Esq., for the petitioners.

J. O. Rhyne, Esq., and J. A. Lyons, Esq., for the respondent.

The Commissioner has proposed an assessment against the estate of Charles H. Hulburd, deceased, of $24,000 as its liability as a transferee of assets of the Van Sicklen Company, representing unpaid income and profits taxes assessed against said company for the fiscal year ended September 30, 1919.

The issues in the case have been severed and the only question for the Board's decision now is whether the statute of limitations bars the proposed assessment. The case is submitted on the pleadings, depositions, stipulations and exhibits.

FINDINGS OF FACT

The petitioners, DeForest Hulburd and Hugh McBirney Johnston, are residents of Illinois, the former of Lake Forest and the latter of Chicago.

Charles H. Hulburd, a resident of Chicago, Ill., died January 14, 1924, leaving a will in which DeForest Hulburd and Hugh McBirney Johnston were nominated executors and trustees and on February 20, 1924, letters testamentary were issued to them by the Probate Court of Cook County, Illinois. Deforest Hulburd was also a legatee and devisee under said will.

The Van Sicklen Company of Elgin, Ill., filed its corporation income and profits tax return for the fiscal year ended September 30, 1919, on December 31, 1919, with the Collector of Internal Revenue at Chicago, Ill.

November 17, 1924, the Commissioner duly and regularly assessed additional income and profits taxes against the [fol. 68] Van Sicklen Company under the provisions of section 274 (d) of the Revenue Act of 1924 for the fiscal year ended September 30, 1919, in the sum of $227,872.06 and a penalty under the provisions of section 250 (b) of the Revenue Act of 1918, in the sum of $113,936.03, which assessment of taxes and penalty had not been paid. The Van Sicklen Company was duly and legally dissolved.

The notice of deficiency from which this proceeding arises was mailed October 27, 1926, addressed to "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Ill."

April 16, 1924, the said executors mailed a letter to the Commissioner, requesting that all taxes due on account of income received during the lifetime of said Charles H. Hulburd, who died January 14, 1924, be determined and assessed within one year, in accordance with the provisions of section 250 (d) of the Revenue Act of 1921.

February 26, 1925, the said executors of the will of Charles H. Hulburd, deceased, filed with the clerk of the Probate Court of Cook County, Illinois, their final account as such executors, reciting that said estate had been fully administered, which account was thereupon approved and recorded and said executors discharged.

Deputy Commissioner Bright, on April 20, 1925, replied to the letter of April 16, 1924, of the said executors, stating that an examination of the returns filed by Charles H. Hulburd for the years 1919 to 1921, inclusive, disclosed no further adjustments necessary for such years. Information relative to the audit of said Charles H. Hulburd's tax returns for 1922, 1923, and for the period January 1, 1924, to January 14, 1924, date of his death, was also given to the effect that deficiencies totaling $5,596.18 would be at once listed for assessment. The executors were in the same letter further advised: "Since the Revenue Act of 1924 is now in effect, the case has been closed under section 277 (a) (3) of that Act."

Opinion

Seawell: The Van Sicklen Company filed its income and profits tax return for the fiscal year ended September 30, 1919, on December 31, 1919. The Commissioner, by vir-

tue of the Revenue Act of 1924, section 277 (a) (2), had five years after such return was filed within which to as- [fol. 69] sess income and excess-profits taxes against it for the fiscal year in question. He made the assessment against the company, as stated in our findings of fact, on November 17, 1924. By the same Revenue Act it is provided:

Sec. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Sec. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

The pertinent provisions of the Revenue Act of 1926 are as follows:

Sec 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including

interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by [fol. 70] any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

At the present stage of these proceedings and for the purpose of the only issue now being considered, we assume the correctness of the Commissioner's determination of the tax assessed against the Van Sicklen Company, a corporation.

In the instant case, the petitioners on April 16, 1924, mailed a written request to the Commissioner for the determination and assessment by him within one year of all taxes due on income received by the decedent during his lifetime. The request was made, as indicated therein, in accordance with the provisions of section 250 (d) of the Revenue Act of 1921. In view of the fact that no determination and assessment of any taxes were made against petitioners within one year after the giving of said notice or request, the statute of limitations is pleaded and relied on. We are of the opinion that said section is not applicable in the circumstances of the instant case.

The Commissioner is not proceeding to enforce collection of a tax or liability asserted under the Revenue Act of 1921 but under a later Revenue Act, 1926, which in some respects repeals, in others reenacts and in still others makes amendments to, prior revenue acts.

The deficiency in tax of the transferor which the Commissioner is now proposing to assess as a liability against the

estate of the decedent, of which the petitioners are executors, is a liability as a transferee of assets of the Van Sick-
[fol. 71] len Company and such liability is asserted under and by virtue of Section 280 of the Revenue Act of 1926, the provisions of which are given, supra.

Under section 280 (b) (2) of said Revenue Act, the Commissioner had one year from February 26, 1926, the date of its enactment, within which to assess the liability in the instant case. The deficiency notice was mailed to the "Estate of Charles H. Hulburd, c/o De Forest Hulburd," October 27, 1926, well within the time prescribed by said Act. The said section has been adjudged constitutional. Annie G. Phillips et al., Executors, v. Commissioner of Internal Revenue, 42 Fed. (2d) 177; Routzahn v. Tyroler, 36 Fed. (2d) 208.

If the decedent is in fact a transferee within the meaning of the statute quoted—which for the purpose of the present issue is assumed—his liability arose when he received assets of the Van Sicklen Company. Such liability, if any, existed prior to and apart from section 280 of the Revenue Act of 1926 but another new and different remedy than then existed was by said Act provided for enforcing such liability. This is made to appear clearly, in the report of the Senate Finance Committee, which had under consideration said section before its enactment. In said report (pp. 28, 29 and 30) it is stated:

> There are a number of situations in which the assets of the taxpayer have, subsequent to the accrual of his tax liability, been disposed of in whole or in part with the result that the Government can not successfully distrain or otherwise collect the full amount of the tax originally returned or found due as a deficiency.

A number of such instances are then given and the statement made:

> In most of the above cases it is probable that under existing law the Government may proceed in equity by suit against the transferee if the transferor no longer exists (that is, in the case of a corporation, is dissolved, or in the case of an individual, is dead), and if the liability of the transferor has not been judicially established by action against the taxpayer before dissolution or death.—Updike

v. United States, decided Circuit Court of Appeals, eighth circuit, December 1, 1925. * * * In all the above cases the transferee is not liable for the tax of the transferor, but is by reason of the receipt of the assets subject to an independent liability in his own person and payable out [fol. 72] of his own estate, arising under the trust fund doctrine or some similar theory.

Again there are a number of situations in which, without reference to any principle of the trust fund doctrine or similar theory, and independent liability arises in respect of a person other than the taxpayer by reason of failure to pay from the taxpayer's estate the tax due from the taxpayer. An example of this is section 3467, Revised Statutes, under which every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person or estate for the debts due to the United States, or for so much thereof as may remain due and unpaid.

Under existing law proceedings for the enforcement of liabilities such as those heretofore discussed are solely by court proceedings. No proceedings before the board for the redetermination of a deficiency and for the ultimate enforcement by assessment and distraint may be had.

It is the purpose of the committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the act for the enforcement of tax deficiencies. It is not proposed, however, to define or change existing liability. The section merely provides that if the liability of the transferee exists under other law then that liability is to be enforced according to the new procedure applicable to tax deficiencies. Thus, upon notice of the liability sent by registered mail, the transferee may make payment and bring claim and suit for refund or may with or without payment petition the board for redetermination with right to appeal to the higher courts. In either case the transferee has the opportunity to go before a court. * * *

The liability which arises in the transferee in respect of the receipt of the assets is normally to be measured by the liability of the transferor at the time of the transfer. This would include the amount of the tax due plus all interest,

additional amounts, and additions to the tax provided by law, up to the time of such transfer. • • •

See also United States v. Nelson B. Updike et al., 281 U. S. 489, in which Justice Sutherland passed on the defense [fol. 73] of the statute of limitations interposed in behalf of certain transferees under the 1926 Revenue Act. The issue there is not identical with the issue in the instant case but we are of the opinion that the same principles there proclaimed are applicable and that the statute of limitations is of no avail to the petitioners, provided the deficiency notice was properly "addressed," it having been sent by registered mail, October 27, 1926.

The petitioners contend that the respondent is precluded from making the proposed assessment because the deficiency notice was mailed after the estate of Charles H. Hulburd had been administered, the assets thereof distributed in accordance with the decree of the court having jurisdiction over the estate and the executors had been discharged. We have, heretofore, decided such question otherwise. See Karl J. Kaufmann, 15 B. T. A. 141; and Elna S. Evans, 12 B. T. A. 334.

Petitioners rely on the case of Nauts v. Clymer, 36 Fed. (2d) 207. The facts of that case are different from those of the instant case. In it the deficiency notice was mailed to L. C. Morgan, one of three former executors of the estate of one George H. Marsh, whose estate had been closed and said executors discharged at the time of mailing. The former executor receiving the notice took no action thereon and so far as the record discloses never informed his former co-executors that he had received any such notice. The decedent, Morgan, had on March 15, 1920, filed his 1919 income tax return and paid the tax shown therein to be due.

On April 3, 1925, a deficiency assessment was made against "George H. Marsh, deceased, L. C. Morgan, Executor, Van Wert, Ohio." The tax was not paid and on November 6, 1926, it was assessed against the appellee, as transferee, under the Revenue Act of February 26, 1926, who paid it under protest, filed claim for refund which was rejected and thereupon brought suit to recover the amount and obtained judgment in the District Court, which was affirmed in the Circuit Court of Appeals. While indicating the deficiency notice mailed appeared insufficient, having

been addressed to only one of three executors who had distributed the estate and been discharged, the Court rather emphasized the fact that limitation expired before the assessment of April 3, 1925.

In the instant case of deficiency notice was addressed to [fol. 74] the "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Illinois."

It does not appear from the evidence that the petitioners, prior to the mailing of the deficiency notice involved herein, informed the Commissioner that they had been discharged as executors of the estate of Charles H. Hulburd, although they had previously advised him they were such executors.

The Revenue Acts of 1924 and 1926 do not prescribe how the deficiency notice shall be "addressed" but do prescribe and require that the "taxpayer" shall be notified of the deficiency "by registered mail."

In the instant case no claim is made that the notice of the deficiency was not sent by registered mail nor that the body or contents of the notice was not proper and sufficient but it is insisted that it was not properly addressed.

On this point petitioners cite Henry M. Day, 12 B. T. A. 161; Walter G. Morgan, 5 B. T. A. 1035; Utah Orpheum Co., 6 B. T. A. 343; and Wyoming Central Association, 8 B. T. A. 1064, in none of which was the question for decision the same as in the instant case. Those were cases in which the deficiency notices were sent to wrong cities or to wrong addresses in cities, thus preventing or delaying the receipt of such notices or where the notice itself was not a deficiency notice.

The purpose of the deficiency notice is to advise the persons liable for the payment of the tax that such deficiency exists. In the instant case the notice indicated that payment of the tax deficiency was expected from the estate of Charles H. Hulburd as a transferee of assets of the Van Sicklen Company. The notice was sent in the care of one of the executors (or who had been such) of said estate, to the proper street and address in Chicago to reach him. He recognized it was intended for the executors of the Charles H. Hulburd estate and evidently so informed the other former executor. Both accepted it as a tax deficiency notice intended for them and both individually and as executors and trustees under the will of Charles H. Hulburd, deceased, filed their petition herein.

In the circumstances of the instant case, we are of the opinion that the proposed assessment of deficiency in tax against the estate of Charles H. Hulburd, deceased, is not barred by the statute of limitations and it is so adjudged. This proceeding will be restored to the calendar for hearing on its merits in due course. Order will be entered accordingly.

[fol. 75] BEFORE U. S. BOARD OF TAX APPEALS

FINDINGS OF FACT AND OPINION—Filed April 7, 1933 (on Merits)

Promulgated April 7, 1933

1. The former estate of a decedent is not liable as a transferee or as the representative of a deceased transferee for the deficiency of a dissolved corporation after the bona fide discharge of the executors if the dissolution and liquidation of the corporation occurred long before the decedent's death and the executors had no notice of or claim for transferee liability before their discharge.

2. Semble that a notice to an estate of "its liability as a transferee" means that the estate and not the decedent has been determined by the Commissioner to be the transferee.

John E. Hughes, Esq., for the petitioners.

Arthur Carnduff, Esq., and J. R. Johnston, Esq., for the respondent.

OPINION

STERNHAGEN:

The respondent, having determined a deficiency and a penalty for the fiscal year ending September 30, 1919, in respect of the Van Sicklen Company, mailed a notice dated October 27, 1926, addressed to "Estate of Charles H. Hulburd, c/o DeForest Hulburd," as follows:

As provided by section 280 of the Revenue Act of 1926, there is proposed for assessment against the estate the sum of $24.000 constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois, representing unpaid income and profits taxes assessed against

the company for the fiscal year ended September 30, 1919, in accordance with the attached statement, plus any penalty and accrued interest.

A petition was filed with the Board by DeForest Hulburd and Hugh McBirney Johnston, individually and as executors of and trustees under the will of Charles H. Hulburd, deceased, in which the petitioners assail the determination of the deficiency, of the penalty, and of the liability of the estate.

The respondent answered by a denial. After a hearing upon the issue whether the statute of limitations had barred the petitioners' liability, it was decided on October 14, 1930, that such liability was not barred. DeForest Hulburd, 21 B. T. A. 23. The proceeding is now submitted for [fol. 76] final decision after trial on the merits.

For the petitioners it is argued, first, that, assuming a proper determination as to the taxpayer corporation and a liability in respect thereof of the decedent as a transferee of the corporation's assets, there is no liability of the estate, because the estate was at no time such a transferee. This argument takes as its postulate a construction of the respondent's notice as one to the estate directly in its capacity as a recipient in its own behalf of assets for which in its own behalf it may be liable as a transferee. The respondent argues that he has not proceeded against the estate in that capacity, but in its capacity as a representative of the decedent, whereby any liability of the decedent is to be imputed to his estate.

There is nothing in the notice of liability which expressly indicates that the determination of the respondent was made in respect of the estate in its representative capacity. The language as above quoted does not mention the liability of the decedent as a transferee and does not indicate that the respondent treats the decedent as a transferee. The expression, "Constituting its liability as a transferee," would on its face convey the idea that the estate was determined to be a transferee and as such was liable. If, however, the language be regarded as ambiguous, the ambiguity is caused by the respondent, and should therefore be resolved adversely to him. To him it was well known that a decedent's estate has a dual existence before the tax law. By section 219, it stands as a taxpayer, in respect of income derived subsequent to the death of the decedent. A

dissolution and distribution by a corporation of which it is a shareholder occurring after the decedent's death may impose upon it directly a liability as a transferee of the corporation's assets. In such case, the language quoted would be apt. But the estate is also liable as the decedent's representative for tax upon income derived by him during his lifetime, and for his lifetime liability as a transferee, if properly demanded. This is not "its liability as a transferee," but it- liability as a representative of the transferee. It seems but natural for the executors or administrators of a decedent's estate, who perchance know nothing of the affairs of the decedent prior to his death, to treat the Commissioner's notice as meaning what it so clearly says, and not to assume an inadvertent use of language and seek for a possible correct meaning for a latent intent. It may not be forgotten that the letter of the executors of April 16, [fol. 77] 1924, requesting a promp- determination of decedent's taxes was, in the Board's earlier opinion, 21 B. T. A. 23, strictly construed against them so as to exclude application to the decedent's transferee liability and prevent a consequent release by limitation.

The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its assets and was dissolved prior to decedent's death, and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate.

But it is not satisfactory to rest the decision on a literal interpretation of the notice of deficiency. Hulburd, the decedent, was the owner in his own right of 80 shares of the Van Sicklen Company, and the respondent says that his share in the final distribution was $8,000. Assuming, arguendo, that it was, it does not follow that his estate is necessarily in this proceeding to be held liable as his representative as he would have been had he lived. The liquidation occurred in 1919, and Hulburd died in January, 1924, leaving a will. The executors were duly appointed, February 20, 1924. With reasonable promptness, on April 16, 1924, they requested the Commissioner in writing to determine the decedent's outstanding income taxes within a year (see section 250 (d), Revenue Act of 1921). Thus the

Commissioner was fully advised of Hulburd's death and of the pending administration of his estate and the opportunity for the presentation of claims against it. Although the executors' written request for a prompt determination of the decedent's income taxes did not refer to any liability he may have incurred as a transferee, nevertheless the Commissioner was thereby made aware of his right to enforce any such transferee liability by a claim against the estate before final distribution. No such claim was filed, although the deficiency and penalty of the Van Sicklen Company were assessed on November 17, 1924, while the estate was being administered. But an order of the probate judge, dated February 26, 1925, the estate was declared settled and the executors, having made final distribution and submitted their final account, were discharged. On April 20, 1925, the Commissioner replied to the executors' earlier request and stated that no further taxes were due for 1919 to 1921 and that there were deficiencies for 1922 to 1924. These were promptly paid and the Commissioner called the [fol. 78] case closed under section 277 (a) (3), Revenue Act of 1924. All this occurred before the enactment of any such provision as section 280, Revenue Act of 1926, providing the administrative remedy for transferee liability. On October 27, 1926, the notice of liability which has already been described was mailed to the estate.

We are of opinion that at the time the notice was mailed there was no liability of the estate or of the petitioners as executors. Both were at that time out of existence, and it would be an anomaly to recognize an existing transferee liability of a nonexisting transferee. Section 280 of the Revenue Act of 1926 did not create new liabilities, but only provided a new remedy for enforcing existing liabilities. Philips v. Commissioner, 283 U. S. 589. No authority is cited for giving it a retroactiove application as a remedy to enforce defunct liabilities or as reviving them. And, however possible it may be to find some retroactive effect in the statute under other circumstances, there is nothing in the present case to justify the belief either that Congress so intended or that it would produce a just result. With full knowledge of his opportunity and ample time within which to use it, the Commissioner took no step to present a claim, but permitted the estate to be closed and the executors discharged without knowledge of the possible liability. It is

not suggested that there were any circumstances indicating lack of good faith or diligence by the executors or that their representations to the probate court resulting in their discharge were disingenuous. If they were, there may still be a remedy for the Government to enforce personal liability of the executors under the Revised Statutes, section 3467. The respondent disclaims any attempt in this proceeding to invoke such a remedy. Section 281, Revenue Act of 1926, and section 312, Revenue Act of 1932, were not in effect during the existence of this estate, and imposed no duties upon the executors here. The decisions under those sections are therefore not pertinent. There is also a plain distinction between this case relating to transferee liability for another's tax and cases involving posthumous deficiencies in the decedent's own tax. Cf. Elna S. Evans, 12 B. T. A. 344; Karl J. Kaufmann, 15 B. T. A. 141; Elnora Haag, 19 B. T. A. 982; affd., 59 Fed. (2d) 516.

Whatever may be the liability of the decedent for his own tax deficiency, or the persistence of such liability at law against his estate and against the discharged executors who [fol. 79] failed to pay the deficiency before their discharge, there is a different question in equity after their bona fide discharge as to their liability for the tax of a corporation of which the decedent was a shareholder prior to its dissolution and liquidation which took place long before his death and of which they were during administration without actual or constructive notice.

We hold, therefore, that there was no liability of the estate as a transferee in its own behalf; and we hold also that in its representative capacity, the estate had no liability at the time of its determination by the respondent. We do not hold that there was no deficiency or penalty in respect of the Van Sicklen Company, and we do not hold that the decedent had no liability in respect thereof, or that the estate had no liability at any time. Nor do we say anything about the liability of any of the beneficiaries under the will or the distributees of the assets of the estate. See Lindley v. United States, 59 Fed. (2d) 336. Those questions are academic in this proceeding and need not therefore be decided.

Reviewed by the Board. Judgment will be entered for the petitioners.

BEFORE U. S. BOARD OF TAX APPEALS

JUDGMENT—Entered Apr. 12, 1933.

In accordance with the Board's report, promulgated April 7, 1933, it is

Ordered, adjudged and decided that there is no liability of the petitioners as transferees of the assets of the Van Sicklen Company in respect of any deficiency in that corporation's income and profits tax for the fiscal year ended September 30, 1919, or penalty, interest, or other addition thereto. Enter.

(Signed) John M. Sternhagen, Member. (Seal.)

[fol. 80] BEFORE U. S. BOARD OF TAX APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed July 14, 1933

To John E. Hughes,
Attorney for Respondent on Review,
First National Bank Building,
Chicago, Illinois:

You are hereby notified that the Commissioner of Internal Revenue did, on the 7th day of July, 1933, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 7th day of July, 1933.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10 day of July, 1933.

—— ——, Respondent on review. (Sgd.) John E. Hughes, Attorney for respondent on review.

BEFORE U. S. BOARD OF TAX APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed July 14, 1933

To DeForest Hulburd,
86 East Randolph-Street,
Chicago, Illinois:
(Residence Lake Forest, Illinois:)

You are hereby notified that the Commissioner of Internal Revenue did, on the 7th day of July, 1933, file with [fol. 81] the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 7th day of July, 1933.

(Signed) E. Barrett Prettyman, General Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10 day of July, 1933.

(Sgd.) De Forest Hulburd, Respondent on Review.
—— ——, Attorney for Respondent on Review.

BEFORE U. S. BOARD OF TAX APPEALS

PETITION FOR REVIEW—Filed Jul. 7, 1933

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorney, Hon. Pat Malloy, Assistant Attorney General, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and J. R. Johnston, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner on review, (hereinafter referred to as the Commissioner), is the duly appointed, qualified and acting

Commissioner of Internal Revenue of the United States, appointed and holding his office by virtue of the laws of the United States. The respondents on review are the duly appointed and qualified executors and trustees, and the chief beneficiaries, under the last will and testament of Charles H. Hulburd, deceased, who died testate January 14, 1924, a resident of Chicago, Cook County, Illinois, leav- [fol. 82] ing an estate of realty and personalty. The Commissioner has heretofore determined that the respondents, as the executors and trustees under the will of said Charles H. Hulburd, deceased, are liable, as the personal representatives of his estate, at law and in equity, under Section 280 of the Revenue Act of 1926, for a deficiency in income and profits taxes imposed upon and assessed against the Van Sicklen Company, a corporation under the laws of Illinois, which, at all times material herein, had its principal office and agency and principal place of business at Elgin, Illinois, and made its returns for Federal income and profits taxes for the fiscal year ended September 30, 1919, to the Collector of Internal Revenue, Chicago, Illinois, all of which is within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit. Hugh McBirney Johnston has departed this life since the institution of this proceeding, leaving DeForest Hulburd, who resides at Lake Forest, Illinois, as the only surviving executor and trustee of said estate.

II

The matter in controversy involves the liability at law and in equity, under Section 280 of the Revenue Act of 1926, of the Estate of Charles H. Hulburd, of which both the petitioners were executors and trustees, and the chief beneficiaries, for taxes imposed upon and assessed against the Van Sicklen Company for the fiscal year ended September 30, 1919, in the amount of $227,872.06, and a penalty thereon, under Section 250(b) of the Revenue Act of 1918, in the amount of $113,936.03, which assessment of taxes and penalty has not been paid. The amount of the liability asserted by the Commissioner against these petitioners, as the personal representatives of the Estate of Charles H. Hulburd, is the sum of $8,000.00, with interest thereon at 6% from February 26, 1926, which liability arose from a

cash distribution in said amount, in the final liquidation of the Van Sicklen Company, made to Charles H. Hulburd, petitioner's téstator in the year 1919.

III

The Van Sicklen Company filed its corporation income and profits tax return for the fiscal year ended September 30, 1919, with the Collector of Internal Revenue, Chicago, [fol. 83] Illinois. On November 1, 1924, the Commissioner of Internal Revenue duly and regularly assessed additional income and profits taxes against said the Van Sicklen Company for the fiscal year ended September 30, 1919, in the amount of $227,872.06, and a penalty under the provisions of section 250(b) of the Revenue Act of 1918, in the amount of $113,936.03, which assessment of taxes and penalty has not been paid and is still outstanding.

Charles H. Hulburd was at all times material herein, prior to his decease, in January 1924, the owner of record of 240 shares of the capital stock of the said Van Sicklen Company, but 160 shares out of said 240 shares were equitably owned by two other individuals. In the year 1919, and prior to September 30, 1919 the Van Sicklen Company sold all of its assets and business to the Van Sicklen Speedometer Company, a corporation organized under the laws of Delaware, and received as consideration therefor $250,000.00 in cash, and 5,000 shares of the common stock of the Van Sicklen Speedometer Company without par value, representing $100.00 per share in cash, and two shares of the common stock of the Speedometer Company received for each of its 2,500 shares of capital stock outstanding. This cash and stock was all distributed to the stockholders of the Van Sicklen Company in proportion to stock owned of record. Each stockholder thereby received $100.00 in cash and two shares of no-par value common stock of the Speedometer Company in final liquidation of each share of the stock of the Van Sicklen Company then owned of record. The Van Sicklen Company was thus left without any assets or property whatever and was thereafter dissolved.

Charles H. Hulburd, in the year 1919, received from the aforesaid liquidating dividends, on the 240 shares of stock of the Van Sicklen Company, of which he was the owner of record, $24,000.00 in cash and 480 shares of the no-par value common stock of the Van Sicklen Speedometer Company.

By reason of the fact that two other individuals were the equitable owners of 160 shares of the said stock of the Van Sicklen Company, all of which stood in the name of Charles H. Hulburd, he, in turn, paid and delivered to them $16,000.00 in cash and 160 shares of the said no-par value stock of the Speedometer Company, leaving $8,000.00 in cash and 80 shares of no-par value Speedometer Company stock retained by Charles H. Hulburd, as his distributive share. [fol. 84] No proof was made in this proceeding of any market value for the no-par value stock of the Van Sicklen Speedometer Company.

The notice of liability (or of deficiency) from which the proceeding in this cause arose, was mailed October 27, 1926, addressed to "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Illinois." DeForest Hulburd and Hugh McBirney Johnston, who were named as executors and trustees and who were the chief beneficiaries, under the will of Charles H. Hulburd, deceased, duly qualified as executors and for said estate, in the year 1924, following the death of Charles H. Hulburd on January 14, 1924. On or about December 21, 1926, "De Forest Hulburd and Hugh McBirney Johnston, Individually and as Executors of and Trustees under the Will of Charles H. Hulburd, Deceased," filed a petition with the United States Board of Tex Appeals, stating under oath that they were then executors and trustees under the will of said Charles H. Hulburd, deceased, and praying for a redetermination with respect to a liability asserted by the Commissioner against the Estate of Charles H. Hulburd, under section 280 of the Revenue Act of 1926, of which due notice had been given in the 60-day letter aforesaid mailed October 27, 1926, and addressed to "Estate of Charles H. Hulburd, 86 East Randolph Street, Chicago, Illinois." The United States Board of Tax Appeals, thereafter, upon the hearing of said petition, re-determined and entered its final order and decision to the effect that the petitioners in said proceeding were not liable because of the fact that they had on February 26, 1925, filed what was termed a final account in the Probate Court of Cook County, Illinois, reciting therein that the Estate of Charles H. Hilburd had been fully administered, which account was thereupon approved and recorded and said executors were ordered discharged as to the matter therein set forth.

IV

A review of said decision and final order of the Board of Tax Appeals, by the United States Circuit Court of Appeals for the Seventh Circuit is sought herein.

[fol. 85] V

The Commissioner says that manifest errors occurred and intervened to his prejudice in the record and proceedings before the Board of Tax Appeals, and in said decision and final order of redetermination rendered and entered by the Board, and the Commissioner assigns the following errors, and each of them, which he avers occurred in said record, proceeding, findings of fact, opinion, decision, and final order of redetermination, upon which he relies as grounds for reversing the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

1. The Board of Tax Appeals erred in not finding that the evidence all of the material facts in this petition set-out bearing upon the question of the liability of the petitioners in this proceeding, under Section 280 of the Revenue Act of 1926; and its findings of fact are without any evidence to support them and are at variance with the undisputed evidence in the case.

2. The Board of Tax Appeals erred in finding and determining that, on February 26, 1926, the date of the enactment of the Revenue Act of 1926, there was no enforcible liability at law or in equity against the Estate of Charles H. Hulburd, Deceased, and against the petitioners, DeForest Hulburd and Hugh McBirney Johnston, as Executors and Trustees under the will of Charles H. Hulburd, Deceased.

3. The Board of Tax Appeals erred in finding and determining that the Estate of Charles H. Hulburd, Deceased, and the petitioners, DeForest Hulburd and Hugh McBirney Johnston, Executors and Trustees under the will of said Charles H. Hulburd, Deceased, are not liable at law or in equity, under Section 280 of the Revenue Act of 1926, as transferees of the assets of the Van Sicklen Company, a corporation, to the extent of a distribution of $8,000.00 made to Charles H. Hulburd within his life time, in final liquidation of the Van Sicklen Company, plus interest thereon at 6% from February 26, 1926.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, and that a transcript of the record, and statement [fol. 86] of the evidence, be prepared in accordance with law and the rules of said Court, and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) Pat Malloy, Assistant Attorney General;
(Signed) E. Barrett Prettyman, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue. Of Counsel: J. R. Johnston, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by J. R. Johnston. Jurat omitted in printing.

[fol. 87] BEFORE U. S. BOARD OF TAX APPEALS

ORDER ENLARGING TIME

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to October 5, 1933.

(Signed) Logan Morris, Member.

Dated Washington, D. C., September 5, 1933.

Now, October 6 1933, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

BEFORE U. S. BOARD OF TAX APPEALS

ORDER ENLARGING TIME

For cause appearing of record, it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above entitled pro-

ceeding in the United States Circuit Court of Appeals for the Seventh Circuit be and it is hereby extended to October 14, 1933.

(Signed) Logan Morris, Member.

Dated Washington, D. C., October 2, 1933.

Now, October 6, 1933, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 88] BEFORE U. S. BOARD OF TAX APPEALS

PRÆCIPE FOR RECORD

Filed Sep. 8, 1933

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly rectified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,

(a) Original petition filed in December, 1926.

(b) Amended petition filed on or about December 4, 1928, including annexed copy of deficiency letter, Exhibit A, thereto.

(c) Answer to amended petition, filed on or about February 1, 1929.

(d) Amendment to answer to amended petition, sent to the Board February 18, 1932.

(e) Motion to amend and order—

"Granted February 27, 1932 (signed) Logan Morris, Member, U. S. Board of Tax Appeals".

(f) Petitioner's reply to respondent's amendment to answer to amended petition, filed at the hearing, March 25, 1932.

3. Interlocutory decision, findings of fact and opinion, promulgated by the Board October 14, 1930.

4. Opinion and decision of the Board, promulgated April 7, 1933.

5. Petition for Review, together with proof of service of notice of filing petition for review, and of service of a copy of petition for review.

6. Statement of the evidence as settled and allowed.

7. Orders enlarging time for the preparation of the evidence and the transmission and delivery of the record.

8. This præcipe.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

[fols. 89-92] Service of a copy of the within præcipe is hereby admitted this 8 day of September, 1933.

(Sgd.) John E. Hughes, Attorney for Respondent.

Clerks' Certificates to foregoing transcript omitted in printing.

[fols. 93-95] [Caption omitted.]

Appearances of counsel omitted in printing.

[fol. 96] In United States Circuit Court of Appeals, Seventh Circuit

5085

Commissioner of Internal Revenue

vs.

DeForest Hulburd and Hugh McBirney Johnston, Individually and as Executors of and Trustees under the Will of Charles H. Hulburd, Deceased

Petition for Review of Judgment of the United States Board of Tax Appeals

Order Setting Cause—October 2, 1934

It is ordered by the court that this cause be, and the same is hereby set down for hearing on October 16, 1934.

In United States Circuit Court of Appeals

[Title omitted]

Minute Entry—Oct. 16, 1934

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Miss Helen R. Carloss, counsel for Petitioner, and by Mr. John E. Hughes, counsel for Respondent, and the Court having heard the same, takes this matter under advisement.

[fol. 97] In United States Circuit Court of Appeals for the Seventh Circuit

No. 5085

October Term, 1934, January Session, 1935

Commissioner of Internal Revenue, Petitioner,

vs.

De Forest Hulburd and Hugh McBirney Johnston, Individually and as Executors of and Trustees under the Will of Charles H. Hulburd, Deceased, Respondents

Petition for Review of Decision of the United States Board of Tax Appeals

Opinion—Filed January 11, 1935

Before Evans, Sparks, and FitzHenry, Circuit Judges

Evans, Circuit Judge:

Charles H. Hulburd died January 14, 1924. De Forest, his son, and one Johnston, his son-in-law, since deceased, were executors of his will, to whom letters testamentary were issued by the Probate Court of Cook County on February 20, 1924.

The decedent was a stockholder in the Van Sicklen Company. This company was dissolved in September, 1919, and most of its assets were transferred to the Van Sicklen

Speedometer Company. The transfer was made without the Van Sicklen Company's paying all the income tax due the Government. On November 17, 1924, the Commissioner assessed additional income taxes for the fiscal year ending September 30, 1919. The amount of such taxes was $227,872.06 and the penalty, $113,936.03.

On this date the taxpayer had been long since dissolved, and its successor was unable to pay the tax. Payment was therefore sought of the various stockholders who had received part of the assets of the Van Sicklen Company in cash. As a stockholder decedent received $8,000 in cash [fol. 98] and stock in the new corporation on or about August 9, 1919. The present controversy revolves about the $8,000 cash payment which decedent received.

The Commissioner has attempted to fasten liability upon DeForest Hulburd either as executor of, or legatee named in the will of Charles H. Hulburd, deceased. He relies upon Sections 280 and 281 of the Revenue Act of 1926, which provide a liability on the part of a transferee of property of income taxpayers who have failed to pay their income taxes.

Sections 280 and 281, Revenue Act of 1926, are set forth in the margin.*

---

* "Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

"(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * * * *

"(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

"(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

[fol. 99] The executors distributed the assets of the estate in accordance with the terms of the will. They filed their final account, which was approved by the Probate Court, and they were discharged on February 26, 1925.

"(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

* * * * * * *

"(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

"(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

* * * * * * *

"(f) As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee." (U. S. C. A., Title 26, Sec. 1069.)

"Sec. 281 * * * (c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

"(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence." (U. S. C. A., Title 26, Sec. 1070.)

On April 16, 1924, respondents wrote a letter[1] to the Commissioner requesting that all income taxes due from decedent be assessed within a year. The Commissioner replied,[2] April 20, 1925, stating that there was no tax due for

---

[1] April 16, 1924.

Commissioner of Internal Revenue,
Washington, D. C.

DEAR SIR:

Pursuant to your letter of April 14, 1924, to our attorneys, Messrs. Gardner and Carton, 76 West Monroe Street, Chicago, the undersigned, DeForest Hulburd and Hugh McBirney Johnston, as executors of the will of Charles H. Hulburd, deceased, hereby request that all taxes due on account of income received during the lifetime of said Charles H. Hulburd, deceased, who died January 14, 1924, be determined and assessed within one year, in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921. A certified copy of our letters testamentary is enclosed herewith.

Yours Respectfully, (signed) DeForest Hulburd,
(signed) Hugh McBirney Johnston."

[2] Treasury Department

Washington

April 20, 1925.

Mr. DeForest Hulburd and Mr. Hugh McBirney Johnston,
Executors, Estate of Charles H. Hulburd, * * * Chicago.

SIRS:

Reference is made to your letter dated April 16, 1924 in which you requested that this office determine and assess all taxes due on the income received by the above-named decedent during his lifetime in accordance with the provisions of Section 250(d) of the Revenue Act of 1921.

In reply you are advised that an examination of the returns filed by Charles H. Hulburd for the years 1919 to 1921 inclusive discloses no further adjustments necessary for these years.

* * * * * * *

Since the Revenue Act of 1924 is now in effect, the case has been closed under Section 277(a) (3) of that Act.

Respectfully, J. G. Bright, Deputy Commissioner, By
(signed) A. Lewis, Head of Division.

certain years and that deficiencies were assessed for other years. The deficiencies thus determined were paid.

The Commissioner, on October 27, 1926, sent a deficiency [fol. 100] notice addressed to the estate of Charles H. Hulburd which was as follows:

"SIRS:

"As provided by Section 280 of the Revenue Act of 1926, there is proposed for assessment against the estate the sum of $24,000.00 constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois, representing unpaid income and profits taxes assessed against the company for the fiscal year ended September 30, 1919, in accordance with the attached statement, plus any penalty and accrued interest."

Upon a showing that $16,000 of the $24,000 received by Charles H. Hulburd from the Van Sicklen Company was intended for and went to others, the Commissioner reduced his claim to $8,000.

The Board of Tax Appeals held the estate was not liable for such tax in as much as the estate was closed before the notice of deficiency was received and that a non-existent transferee could not be held liable for unpaid income taxes due from a transferor. The Board also held that the liability sought to be imposed upon the estate was that of a transferee and not that of a representative of a transferee and, in as much as the Van Sicklen Company made no transfer to the estate itself, or of moneys paid to the decedent which could be traced to the estate, there was no liability on the part of the estate for this tax. The Commissioner did not raise, and the Board did not pass upon, the question of liability of a legatee or beneficiary as a statutory transferee.

The Board rendered a separate opinion wherein it held the Commissioner's claim was not barred by any statute of limitations.

The liability here sought to be imposed, while closely associated with, must be distinguished from a liability for income tax. That there is a difference between the two is apparent from the fact that, in the absence of statute, it would be impossible to levy an income tax directly upon one who received property from a taxpayer who had not paid

his income tax, in an amount equal to the sum he received from the defaulting taxpayer.

The Commissioner's right, under the statute existing at the time, to levy the added deficiency tax against the Van Sicklen Company on the seventeenth day of November, 1924, is unchallenged. When Van Sicklen Company failed to [fol. 101] pay its income tax, decedent Hulburd became liable (to the extent of the $8,000) to the timely assessment of an $8,000 tax as a transferee. Concerning this assumption, we think there is, or at least should be, no legitimate controversy. True, there could also have been assessed a tax against the Van Sicklen Speedometer Company. But the right to assess one tax did not exclude the right to levy upon another.

Had Charles H. Hulburd not died he would therefore have been subject to the assessment of an $8,000 tax as a transferee of the defaulting income taxpayer, Van Sicklen Company. Such a liability would, of course, be subject to all the legal defenses available to any taxpayer such as the bar of the statute of limitations, as well as the defense that proper preliminary steps were not taken by the Commissioner. Whether it might also be barred by estoppel, we need not decide.

We think it also clear that deceased's liability survived his death, and his liability became the liability of his executors for the amount of the Commissioner's claim against deceased.

Respondents seek to avoid the tax assessment because: (1) The estate had been administered and the executors discharged after they had made the written request of the Commissioner as above described before any action was taken by Commissioner to assess the tax upon the transferee. (2) The Commissioner's claim was barred by the statute of limitations when the tax was assessed. (3) Neither respondent is liable as executor of the estate of Charles H. Hulburd or as a legatee named in his will.

As we view the case there are three questions, the answers to which determine liability. (a) Was the tax against the legatee barred by the statute of limitations or the action of the Commissioner before the tax was assessed or by the discharge of the executors and the distribution of the assets of the Charles H. Hulburd estate? (b) May a

tax assessed against a transferee levied within the time fixed by statute be enforced (1) against the legatee of said transferee in case the transferee died, or (2) against the executor of the will of said transferee in case the transferee died before the act authorizing the assessment of a tax against a transferee was passed? (c) If question (b) be answered in the affirmative, was the tax in this case properly and timely levied?

The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executors as a fund impressed with a trust. [fol. 102] He does not and can not, therefore, base his right to assess the tax on any trust fund theory other than that created and defined by the statute.

Although respondents won before the Board of Tax Appeals on other grounds, their first and chief contention in this court is that the Commissioner's claim was barred by statute when the tax in question was assessed. We agree with them that an adverse decision by the Board of Tax Appeals does not prevent their raising this same question here. Generally speaking, it is their contention that, because the executors in writing requested the Commissioner to determine all the income tax due against the decedent, within one year, and the Commissioner acted, this notice and this action by the Commissioner barred him from making further tax assessments. In other words Section 250, which gives to the executors or administrators of an estate the right to demand the determination of all income taxes against the estate within one year, is a short statute of limitations which bars further action by the Commissioner.

We fail to find anything in the letters that passed between the executors and the Commissioner which would prevent the latter from assessing the tax in question. Both referred to the income tax of decedent. Neither mentioned the assessment of a tax against the deceased as transferee.

That Section 250 (d) is limited to income tax and does not apply to taxes assessed against transferees is manifest from the first sentence of said section, "the amount of income tax * * due under any return made under this Act * * *." A transferee as such makes no return and the limitation of time is therefore directed to and limited by the return of an income taxpayer. Moreover, it would be giving to the statute a most unreasonable construction if the Com-

missioner were bound to include in his claim for taxes the sums which may be assessed against the decedent as a transferee. The Commissioner, of course, could not have known whether decedent was a transferee of a defaulting income taxpayer. In the case before us, he had no facts indicating such a situation. At the time, the statute which authorized the assessment of a tax against the transferee had not been enacted.

The requirement which necessitates determination of a tax by the Commissioner within one year from the date the executor makes written request therefor is reasonable, for the determination of the tax is based upon returns which give the necessary information to the Commissioner upon which he may make a correct assessment. All such fact requirements are absent in the case of the tax against a trans- [fol. 103] feree. With no return made by such transferee, and without information to the Commissioner concerning the existence of any liability as a transferee, respondents nevertheless argue that the Commissioner should be bound by his statement of income taxes due from the decedent, which was based upon income of decedent as shown by sworn returns made by the decedent.

The tax in question was assessed within the time permitted by the statute.

The original tax against the Van Sicklen Company was assessed within the statutory period, namely, on November 17, 1924. The proposal for assessment against the transferee was made within the time permitted by statute (Section 280 (b) (2)) namely, with one year of the date of the enactment of the Act. U. S. v. Updike, 281 U. S. 489. The notice was mailed October 27, 1926. The Act was passed February 26, 1926. The proposal of assessment was addressed to the Estate of Charles H. Hulburd, % DeForest Hulburd, 86 E. Randolph St., Chicago, Illinois. It was in fact received by the executors. The assessment was not actually made and could not be made until 60 days from October 27, 1926, the date of the notice of the proposed assessment. Section 274(a), Act of 1926. Respondents sought redress therefrom by petitioning the Board of Tax Appeals for a review of said proposal and for this period

of review before the Board of Tax Appeals and this court, the statute of limitations was tolled. It follows, therefore, that the claim is not barred by the statute.

Respondents' contention that the Commissioner is attempting to assess a tax against a transferee of a transferee instead of merely against the transferee, which was the extent of its power, is answered by Section 280 (3) (f), which reads:

"As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee."

As DeForest Hulburd received $4,000 of the $8,000 which his father received as transferee of Van Sicklen Company, we think, as to him, this section of the statute is conclusive. The property in the hands of the executors and which was distributed among the legatees (one-half of the residue going to the respondent Hulburd) was far in excess of the amount required to pay this $8,000 tax.

As to the executors, Section 281 (b) seems to be applicable.

"Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and [fol. 104] privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated."

The subsection seems to require that the executors notify the Commissioner before their liability can be terminated. It likewise assumes, although it does not directly create, a liability on the part of the estate for the tax for which the deceased was liable at the time of his death. Petitioner is not, however, compelled to rely upon this section to establish liability of the executors for the tax in question. At the time Hulburd died, he was liable to be assessed for this tax. Upon his death his estate was equally liable. Upon the death of a transferee, his estate becomes liable for the tax to which the deceased transferee was subject. The estate was not the transferee of a transferee. The estate was the original transferee. A legatee of the deceased to

whom the estate was passed was also by Section 280 (3) (f) an original transferee.

We are also satisfied that the Act was intended to apply and does apply to taxes against a transferee, even though the unpaid income tax accrued prior to the passage of the Act and the transfer by the income taxpayer to the transferee was made prior to the passage of the Act.

Respondents finally argue that the notice which Commissioner sent to the estate of Charles H. Hulburd and which was received by the executors was insufficient to extend the statute of limitations. Their reliance is on Nauts v. Clymer, 36 F. (2d) 207, and Lieberman's Committee v. Commissioner, 54 F. (2d) 527. It is true that at the time such notice was received the estate of Charles H. Hulburd had been administered. The executors, however, had not notified the Commissioner of the termination of their status as executors.

We think the facts in the case of Nauts v. Clymer are distinguishable from those in the present case. Moreover, if the notice were insufficient, its insufficiency was waived by the executors' applying to the Board of Tax Appeals for review of it. This action naturally led the Commissioner to assume that the notice was sufficient and that he should take no further steps to notify of the proposed assessment of the tax. After taking this action, respondents are in a most embarrassing position to assert the contrary. We agree with the views expressed in Continental Products Co. v. Commissioner, 66 F. (2d) 434:

"• • • But the shorter and conclusive answer to the petitioner's contention is that such brazen repudiation by [fol. 105] a party of its own acts and assertions, on which the other party evidently relied, is not legally permissible."

It is finally argued that the Commissioner should have proceeded and exhausted all his remedies against the Van Sicklen Speedometer Company. There is certainly much of merit in the respondents' position that they should not be held liable for the tax of another if it be possible to collect a tax from the original debtor. On the other hand, if proceedings of this kind had been begun against the original taxpayer, the respondents could have pleaded the statute of limitations, although the delay was occasioned by

an effort to collect the tax from the original debtor. We must take the statute as it is. The Commissioner had the right to assess the tax against any transferee of a taxpayer who neglected to pay his taxes. Doubtless the transferee has a cause of action against the defaulting taxpayer. At any rate the transferee cannot contest the assessment of a tax due from him because as between him and another person said other person should pay it.

The Board of Tax Appeals assumed the correctness of the tax assessment against Van Sicklen Company. Respondents denied the existence of facts which showed such tax liability. The Board of Tax Appeals disposed of the question without determining this issue. It said:

"At the present stage of these proceedings and for the purpose of the only issue now being considered, we assume the correctness of the Commissioner's determination of the tax assessed against the Van Sicklen Company, a corporation."

In the absence of a determination of the correct amount of tax due from the Van Sicklen Company, it is impossible to finally dispose of this case. We can only reverse the order and direct that the Board ascertain the true amount of the tax against Van Sicklen Company. On that hearing we think the respondents may show, if such be the fact, that taxes have been paid by other transferees or by the Van Sicklen Speedometer Company, in which case the amount of such payments should be deducted from the tax which the Board assesses against the transferees of the Van Sicklen Company.

The order is therefore reversed with directions to proceed in accordance with the views expressed in this opinion.

[File endorsement omitted.]

[fol. 106] IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Louis FitzHenry, Circuit Judge.

5085

COMMISSIONER OF INTERNAL REVENUE

vs.

DEFOREST HULBURD and HUGH MCBIRNEY JOHNSTON, Individually and as Executors of and Trustees under the Will of Charles H. Hulburd, Deceased

Petition for Review of Decision of the United States Board of Tax Appeals

JUDGMENT—January 11, 1935

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the Judgment of the said United States Board of Tax Appeals, entered in this cause on April 12, 1933, be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals with directions to proceed in accordance with the views expressed in the Opinion of this court.

MEMO. RE PETITION FOR REHEARING

And afterwards, to-wit: On the nineteenth day of January, 1935, there was filed in the office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

[fols. 107 & 108] MEMO. RE ANSWER TO PETITION FOR REHEARING

And afterwards, to-wit: On the twelfth day of April, 1935, there was filed in the office of the Clerk of this court, an Answer to the Petition for a Rehearing, which said Answer is not copied here.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—April 15, 1935

It is ordered by the court that the Petition for a Rehearing in this cause be, and the same is hereby denied.

[fol. 109] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 110] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,565. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 39. De Forest Hulburd, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed May 2, 1935. File No. 39 O. T. 1935.

FILE COPY

MAY 2

CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1934.

No. [redacted] 39

DE FOREST HULBURD,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Building,
Chicago, Illinois,
Counsel For Petitioner.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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IN THE

Supreme Court of the United States

October Term, 1934.

No.

DE FOREST HULBURD,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Henry A. Gardner, Alfred T. Carton and John E. Hughes, on behalf of DeForest Hulburd, pray that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on January 11, 1935 (rehearing denied April 15, 1935), reversing the decision of the Board of Tax Appeals reported in *27 B. T. A. 1123.*

QUESTIONS PRESENTED.

(1) Whether the Circuit Court of Appeals had the right to hold respondent liable and reverse the decision of the Board on a ground neither asserted by the Commissioner in the notice of deficiency nor before the Board of Tax Appeals, nor in the assignment of errors in the appeal petition, but raised for the first time in the Circuit Court of Appeals in the Commissioner's brief.

(2) Whether *Section 281 (b) of the Revenue Act of 1926 (U. S. C. A., Title 26, Sec. 1070)* is retroactive.

(3) Whether *Section 280 of the Revenue Act of 1926 (U. S. C. A, Title 26, Sec. 1069)* creates any liability.

(4) Whether a notice sent to executors a year after their discharge by the Probate Court is sufficient to extend the statute of limitations for the enforcement of an alleged existing liability of a non-existent estate.

(5) Whether a liability under the trust fund doctrine survives to executors or legatees who have concededly received no assets impressed with a trust.

(6) Whether if the retroactive construction of the statute by the Court of Appeals is correct it offends the *Fifth Amendment.*

STATUTES INVOLVED.

Revenue Act of 1926, C. 27, 44 Stat. 9.

Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as

the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in *subdivision (d) or (f)* of this section or in *sections 279, 282,* or *1001,* no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of *section 3224 of the Revised Statutes* the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. *(U. S. C. App., Title 26, Sec. 1048.)*

Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war profits tax Act.

(2) The liability of a fiduciary under *section 3467 of the Revised Statutes* in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods, then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under *subdivision (a) of section 274* to the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee. *(U. S. C. App., Title 26, Sec. 1069.)*

Sec. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in *section 280*, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under *subdivision (a)* or *(b)* shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under *subdivision (a)* or *(b)*, notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. *(U. S. C. App., Title 26, Sec. 1070.)*

STATEMENT.

The petitioner was executor of the estate of Charles H. Hulburd, who died January 14, 1924. He was discharged by the Probate Court as executor on February 26, 1925, and the estate declared settled and the final account of the executors showing how they had distributed the estate approved (R. 64). One year after his discharge and on February 26, 1926, the *Revenue Act of 1926*, which was construed to impose a liability upon petitioner

by the Circuit Court of Appeals, was enacted. Eight months thereafter the Commissioner first made this claim against petitioner in the case at bar.

Petitioner's intestate, Charles H. Hulburd, during his lifetime and in the year 1919 had received $8,000 as a dividend from the Van Sicklen Company. The Van Sicklen Company dissolved in September 1919, after transferring its assets to another corporation (R. 38). The Van Sicklen Company filed a return and paid the tax which it computed to be due, but on November 17, 1924, the Commissioner made an additional assessment of income and profits taxes and penalties against the Van Sicklen Company (which as aforesaid had dissolved in September 1919) in the amount of $227,872.06 plus a penalty of $113,936.03.

When the Commissioner learned the Van Sicklen Company was not in existence he, having ascertained that Charles H. Hulburd then deceased, had received a dividend of $8,000 from it in 1919 and that petitioner had been executor of decedent's estate, mailed on October 27, 1926, (one year and eight months after petitioner's discharge) a notice of deficiency addressed as follows:

"Estate of Charles H. Hulburd,
c/o DeForest Hulburd,
86 E. Randolph Street,
Chicago, Illinois,

and claiming a liability* as follows:

"As provided by *Section 280 of the Revenue Act of 1926*, there is proposed for assessment against the estate the sum of $24,000.00, constituting its liability as a transferee of the assets of the Van Sicklen Company" (R. 15).

* In deciding the case on the merits in favor of this petitioner the Board of Tax Appeals said (R. 78): "It would be an anomaly to recognize an existing transferee liability of a non-existing tranferee."

Petitioner appealed to the Board of Tax Appeals and the Commissioner, upon whom the statute places the burden of proof in transferee proceedings failed to prove that the estate or this petitioner in any capacity had ever received any of the assets of the Van Sicklen Company and the Board of Tax Appeals in *27 B. T. A. 1123*,* gave judgment on the merits for this petitioner, saying that the claim in the above quoted notice of deficiency was against the estate as transferee and (R. 77):

> "The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its assets and was dissolved prior to decedent's death and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate."

The correctness of this finding of the Board cannot be questioned here and was not challenged, either in brief or argument, by the Commissioner in the Circuit Court of Appeals but that Court reversed the decision of the Board on the ground that notwithstanding petitioner had received none of the assets of the Van Sicklen Company, either as executor or legatee, nevertheless he was made liable as a transferee** by the statute quoted on page 3 hereof.

As the Circuit Court of Appeals stated in its opinion (R. 100), the question of the liability of the petitioner as a legatee had not been raised by the Commissioner before

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* The Board by order severed the issues and tried the question of the statute of limitations first but decided this against the petitioner. 21 B. T. A. 23 (R. 68-74).

** Concededly no assets of the taxpayer (Van Sicklen Company) were transferred to petitioner and the Board so found.

the Board of Tax Appeals. Neither was it raised in the above quoted notice of deficiency (R. 15) which was addressed solely to the estate and which asserted a liability as a transferee against the estate alone as fully appears from the above quotation from it, nor was it made in the assignment of errors in the petition for review of the Board's decision (R. 85). It was raised for the first time in the Commissioner's brief filed in the Circuit Court of Appeals on January 27, 1934.

SPECIFICATION OF ERRORS TO BE URGED.

The petitioner urges that the Circuit Court of Appeals erred:

(1) In holding petitioner liable and reversing the Board's decision on a ground neither asserted by the Commissioner in the notice of deficiency nor before the Board of Tax Appeals, nor in the assignment of errors in his petition for review of the Board's decision;

(2) In holding that *Section 281 (a) and (b) of the Revenue Act of 1926* was retroactive and imposed liabilities upon persons who had been discharged as executors long prior to its enactment;

(3) In holding that *Section 280 of the Revenue Act of 1926* created a liability and that thereunder petitioner was liable;

(4) In holding that the statute of limitations was tolled by the deficiency notice sent to the executors on October 27, 1926, or a year and eight months after their discharge;

(5) In failing to hold that the sections of the Act as construed by it violated the *Fifth Amedment to the Federal Constitution;*

(6) In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT.

1. The Court below stated that the question whether petitioner was liable as an executor was not raised by the Commissioner before the Board of Tax Appeals (R. 100). Neither is it asserted in the notice of deficiency (R. 15), nor in the assignment of errors (R. 85).

On the question of whether the Circuit Court of Appeals can reverse a decision of the Board of Tax Appeals on a question not presented or urged before that Board, the decisions of the Circuit Courts of Appeal are in sharp conflict. The following cases among others are in conflict on this point with the case at bar: *Helvering v. J. L. Brandeis & Sons, 75 F. (2d) 487, 489 (C. C. A. 8th); Tulsa Tribune Co. v. Commissioner, 58 F. (2d) 937, 940 (C. C. A. 10th); Glassell v. Commissioner, 42 F. (2d) 653 (C. C. A. 5th); Hartley v. Commissioner, 72 F. (2d) 352 (C. C. A. 8th); Atkins Estate v. Lucas, 36 F. (2d) 611, 613 (App. D. C.); Tricou v. Helvering, 68 F. (2d) 280, 286 (C. C. A. 9th).*

The opposite view is taken in *Helvering v. General Utilities & Operating Co., 74 F. (2d) 972, 976 (C. C. A. 4th),* and other decisions of the same Court.

2. Petitioner had been discharged as executor by valid Court order one year before the *enactment of the Revenue Act of 1926.* Nevertheless the Circuit Court of

Appeals in its opinion (R. 103, 104) holds *Section 281 (b)* applicable to him. This is squarely in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Liberman's Committee v. Commissioner, 54 F. (2d) 527,* wherein at page 529 it is expressly stated that this section is not retroactive. It also fails to give effect to decisions of this Court holding that a retroactive construction is not to be given a statute unless its words make such construction imperative. This point is of great importance because if this statute is retroactive anyone who has ever been an executor and was discharged before its enactment remains liable unless he gives notice to the Commissioner after its enactment that he is no longer acting as such, and until the decision in the case at bar it has never been so construed either by the Department or by the Courts.

3. On the merits the Circuit Court of Appeals in its opinion in the case at bar said:

> "The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executors as a fund impressed with a trust. He does not and cannot, therefore, base his right to assess the tax on any trust fund theory *other than that created and defined by the statute.*" (Italics ours.)

The entire opinion of the Court proceeds upon the theory that *Section 280* creates and defines a liability. This is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Oswego Falls Corporation, 71 F. (2d) 673, 676;* also with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Exchange National Bank of Shreveport v. United States, 65 F. (2d) 316;* and is opposed to the statement of this Court in *Phillips v. Commissioner, 283 U. S.*

589. It is also opposed to the express statements in the Conference Report and in the Report of the Senate Finance Committee quoted at page 19 of the brief in support of this petition. This question is a fundamental one in the construction of this law and one of obvious importance.

4. In holding that a notice addressed to executors a year and eight months after their discharge is sufficient to extend the statute of limitations for the assertion of a liability against a then non-existent estate the decision in the case at bar is directly in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Nauts v. Clymer, 36 F. (2d) 207*, and the decision of the Circuit Court of Appeals for the Ninth Circuit in *Lindley v. United States, 59 F. (2d) 336.*

5. On general principles of law the decision is unsound. It deals with a provision of law of general and national application and importance and unless reversed will create confusion in the law.

6. Finally it is submitted that the retroactive construction of the law by the Circuit Court of Appeals renders it arbitrary and capricious and contrary to the *Fifth Amendment to the Federal Constitution.*

Wherefore it is respectfully submitted that his petition should be granted.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Building
Chicago, Illinois.
Counsel for Petitioner.

May 1, 1935.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals is reported in *27 B. T. A. 1123* (R. 75-79). The opinion of the Circuit Court of Appeals (R. 90) is not yet reported but appears in the record at pages 97 to 105.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 11, 1935 (R. 106). A petition for rehearing was denied April 15, 1935 (R. 107).

The jurisdiction of this Court is invoked under *Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.*

QUESTIONS PRESENTED, STATUTE INVOLVED, ETC.

A statement of the questions presented, statute involved, specification of errors to be urged and a statement of the case has been made in the foregoing petition.

ARGUMENT.

In holding petitioner liable as a legatee, notwithstanding an utter lack of proof or claim that he received any property of the Van Sicklen Company, the Circuit Court of Appeals passed upon a question not raised before the Board of Tax Appeals, nor in the Commissioner's notice of deficiency, nor even in the assignment of errors in the Commissioner's petition for appeal to the Circuit Court of Appeals.

The Court in its opinion said (R. 100):

> "The Commissioner did not raise and the Board did not pass upon, the question of liability of a legatee or beneficiary as a statutory transferee."

In reversing the decision of the Board of Tax Appeals on a claim not made before it and consequently not passed upon by it, the decision in the case at bar is squarely in conflict with the decisions of the Courts of Appeal for the Eighth, Ninth, Tenth and Fifth Circuits and with a decision of the Circuit Court of Appeals of the District of Columbia but is supported by decisions of the Court of Appeals for the Fourth Circuit.

In *Helvering v. J. L. Brandeis & Sons, 75 F. (2d) 487* the Circuit Court of Appeals for the Eighth Circuit said at page 489:

> "Aside from the failure of the record to disclose facts sufficient to support this contention of petitioner, it is to be noted that the Commissioner in his notice of deficiency did not state this ground for disallowing the deduction claimed. He said: 'Since the resolutions of the board of directors pertaining to the salary increase do not include the fiscal year ending January 31, 1928, no deduction can be taken

in that year for accrued salaries deductible in preceding years and your contentions in respect thereto are denied.' Nor did the Commissioner urge this new ground before the Board of Tax Appeals. This appears from the opinion of the Board: 'It is stated in the brief filed on behalf of the respondent (petitioner herein) that the deduction of $80,000 for additional salary paid to George Brandeis in 1928 was disallowed by the respondent upon the ground that it represented an adjustment of the additional compensation agreed to be paid for the fiscal years 1923 to 1927 and should have been deducted in the preceding years. The respondent's position is not supported by the evidence of record.'

This new ground, therefore, is not before this Court on the Commissioner's petition to review the decision of the Board of Tax Appeals. *Hartley v. Commissioner (C. C. A. 8) 72 F. (2d) 352; Tulsa Tribune Co. v. Commissioner (C. C. A. 10) 58 F. (2d) 937; Glassell v. Commissioner (C. C. A. 5) 42 F. (2d) 653.*"

The case at bar is a much stronger case, for here not only did the Commissioner fail to present to the Board the ground of the legatee's liability, but *even the very question of the liability of the legatee* was not presented to the Board and was not raised in the notice of deficiency nor in the assignment of errors in the petition for a review of the Board's decision.

In *Tricou v. Helvering, 68 F. (2d) 280,* the Court of Appeals for the Ninth Circuit said at page *286:*

"The question the petitioner seeks to present to us is raised for the first time on this appeal. * * * The question sought to be raised here was not presented to or decided by the Board of Tax Appeals, and for that reason error cannot be predicated on their failure to consider that matter."

For other decisions holding the same see the petition for the writ herein.

Opposed to these decisions of the Courts of Appeal for the Eighth, Ninth, Tenth and Fifth Circuits, and the Court of Appeals of the District of Columbia is the decision of the Court of Appeals for the Fourth Circuit in *Helvering v. General Utilities & Operating Co., 74 F. (2d) 972, 976,* and other decisions of that Court cited therein.

The reasoning of the Fourth Circuit that "Courts exist to do justice and not to furnish a forum for the technical skill of counsel," carried to its logical conclusion would justify a Court in disregarding all rules of law if the result of applying them did not conform to such ideas of justice as the members of the particular Court might happen to entertain. It seems to overlook that taxes are not creatures of abstract justice and do not exist in equity, but are purely statutory imposts.

The sharp conflict among the Circuit Courts of Appeal on this important question of procedure in appeals from the Board of Tax Appeals, would alone justify the granting of the writ.

This Court has many times held that a point not made in the Court below may not be first raised by one seeking to upset the judgment on appeal. *Blair v. Oesterlein Co., 275 U. S. 220, 225; Magruder v. Drury, 235 U. S. 106, 113; San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 97; Burnet v. Commonwealth Imp. Co., 287 U. S. 415, 418.*

Apart from the above there is another important reason why the question of the liability of the legatee should not have been passed upon by the Circuit Court of Appeals.* In order to toll the statute of limitations the law requires the Commissioner to issue notice of deficiency to the person from whom the tax is claimed within a limited

*The belated allowance of this claim prevents its deduction in computing the federal estate tax because the statute of limitations on a refund claim has run.

time. The notice of deficiency issued in this case was addressed only to the decedent's estate and merely states* (Rec. 15, 16):

> "There is proposed for assessment against the estate the sum of $24,000, constituting its liability as a transferee of the assets of the Van Sicklen Company."

No other or different claim was made and when the case was decided by the Circuit Court of Appeals in 1935, and when the claim that the legatee was liable was first made in that Court by the Government in 1934 in its brief, the statute of limitations had for many years run on the making of a new and different claim other than that made in the notice of deficiency, and a notice mailed to the legatee at the date the claim against him was first made would have been years too late.

There is no evidence to show and it has not been proved by the Government that the estate was at any time "a transferee of the assets of the Van Sicklen Company" as claimed in the notice of deficiency, and the Board expressly found it was not (R. 77). The legatee received his property from the executors and was not a transferee inasmuch as the executors were not.

SECTION 281 (b) OF THE REVENUE ACT OF 1926 IS NOT RETROACTIVE, AND IN HOLDING THAT IT IS THE CASE AT BAR IS IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Section 281 (b) of the Revenue Act of 1926 was enacted a year after the petitioner had been discharged as executor and the distribution of the estate approved by the Probate Court.

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* The notice of deficiency will be combed in vain for any claim against the legatee.

The Board of Tax Appeals in its opinion in the case at bar said (R. 78):

> *"Section 281, Revenue Act of 1926,* and *Section 312, Revenue Act of 1932,* were not in effect during the existence of this estate and imposed no duties upon the executors here. The decisions under those sections are therefore not pertinent."

Nevertheless the Circuit Court of Appeals in reversing the decision of the Board held that this section was applicable (R. 103-4). In construing this section to be retroactive the case at bar is on this point squarely in conflict with the decision of the Court of Appeals for the Second Circuit in *Liberman's Committee v. Commissioner, 54 F. (2d) 527,* wherein the Court at page *529* quotes the statute and the Treasury Regulation thereunder and says:

> "Secondly, and this seems to us a conclusive answer to the contention, *section 281 (a), 26 U. S. C. A. Sec. 1070 (a),* speaks prospectively from the date of its enactment, February 26, 1926 (see *section 286, (26 U. S. C. A., Sec. 931, note)*), and relates only to actual fiduciaries who thereafter give notice to the Commissioner that they are acting as such."

The opinion in the case at bar makes no attempt to distinguish this case. The Circuit Court of Appeals for the Second Circuit and the Board of Tax Appeals in the case at bar are manifestly correct and the Circuit Court of Appeals for the Seventh Circuit is manifestly wrong in giving this statute retroactive effect. Otherwise any person who had been an executor and was discharged prior to the date of the enactment of the *Revenue Act of 1926* would be made liable by that Act unless he thereafter gave notice that he was no longer acting as executor. this is the law thousands of executors discharged years ago are still liable. Such a construction is opposed to the familiar rule against retroactive construction many times stated by this Court. (See *Union Pacific R. R. Co. v. Laramie Stock Yards Co., 237 U. S. 190, 199.)* There are no

words either in the statute nor in the regulation itself purporting to be retroactive and to apply to estates closed prior to its passage, and hitherto no Court has so construed it.

IN HOLDING THAT SECTION 280 CREATED AND DEFINED A LIABILITY THE DECISION IN THE CASE AT BAR IS IN CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEAL FOR THE SECOND AND FIFTH CIRCUITS.

The Court in its opinion in the case at bar states (R. 101-2):

> "The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executors as a fund impressed with a trust. He does not and can not, therefore, base his right to assess the tax on any trust fund theory other than that created and defined by the statute."

Section 280 of the statute does not create and does not define any liability and as respondent can only base his claim on the assumption that it does, he must fail. In stating that it did, the decision in the case at bar is squarely in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Exchange National Bank of Shreveport v. United States, 65 F. (2d) 316*, and with the decision of the Court of Appeals for the Second Circuit in *Commissioner v. Oswego Falls Corporatoin, 71 F. (2d) 673, 676.* It is also contrary to the statement of this Court in *Phillips v. Commissioner, 283 U. S. 589.* The Board of Tax Appeals was right in stating (R. 78): "*Section 280 of the Revenue Act of 1926* did not create any liabilities, but only provided a new remedy for enforcing existing liabilities. *Phillips v. Commissioner, 283 U. S. 589,*" and the Circuit Court of Appeals in the case at bar was wrong in holding otherwise.

The *Conference Report on the Revenue Act of 1926, 69th Congress, First Session, Report No. 356,* states at page *43:*

> *"Without in any way changing the extent of such liability of the transferee under existing law,* the amendment enforces such liability (whether in respect of the tax as originally returned by the taxpayer or a deficiency therein) in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts." (Italics ours.)

The Senate Finance Committee Report (which is quoted in the opinion of the Board of Tax Appeals at page 71 of the Record) states as follows:

> "It is the purpose of the Committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the Act for the enforcement of tax deficiencies. *It is not proposed, however, to define or change existing liability.* The section merely provides that *if the liability of the transferee exists under other law,* then that liability is to be enforced according to the new procedure applicable to tax deficiencies."* (Italics ours.)

In the case at bar the respondent merely proved that Charles H. Hulburd in 1919 received $8,000 from the Van Sicklen Company. He did not trace any of this money into the hands of the executors or into the hands of this petitioner, who as legatee is one step farther removed from Charles H. Hulburd than his executors. Between 1919, the date of his death, and 1924, Charles H. Hulburd very likely did and for ought that appears spent the $8,000 which he received from the Van Sicklen Company

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* This report is also quoted in **Wire Wheeled Corporation of America, 16 B. T. A. 737, at page 742, which was affirmed by the Circuit Court of Appeals for the Second Circuit in 46 F. (2d) 1013.**

in 1919, for current expenses during the period of approximately five years between its receipt and his death. From the mere fact that his legatee years afterwards received $20,685.79 in cash, it cannot be assumed that the $8,000 received in 1919 by the decedent from the Van Sicklen Company, or any part thereof was included in this sum. This principle of law is well established. A statement of it appears in the Article on *"Trusts"* in *65 Corpus Juris, paragraphs 889-900,* and particularly in *paragraph 900.* In *St. Louis & S. F. R. Co. v. Spiller, 274 U. S. 304,* this Court said at page *310:*

> "The money was not earmarked. It was mingled when collected with other money received from operation. And no special account was kept of it. The latest exaction occurred five years before the appointment of the receivers. The assertion that the money collected can be traced into the receivers hands is confessedly without any support except the stipulated fact that throughout the ten years which elapsed between the earliest exaction and the transfer of the properties to the new company, the old one and the receivers had, at all times, in the several banks on which checks for current expenses were drawn, a working balance, in the aggregate, largely in excess of Spiller's claim. Such a showing fails to bring the present case within the rule by which, when trust funds are mingled with others, the *cestui* may assert an equitable lien upon the mingled mass to the extent of his contribution thereto. *American Can Co. v. Williams, 101 C. C. A. 634, 178 Fed. 420, 423; Re: A. D. Matthews' Sons, 151 C. C. A. 635, 238 Fed. 785, 787.* An illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears, all the money illegally exacted may have been spent for current operating expenses."

The last sentence of this opinion applies to the case at bar.

A fundamental misconception running through the whole opinion of the Circuit Court of Appeals in this case is that *Section 280* created a tax liability on the part of Charles H. Hulburd. The Court said:

> "At the time Hurburd died, he was liable *to be assessed for this tax.* Upon his death his estate was equally liable. Upon the death of a transferee, his estate *becomes liable for the tax* to which the deceased transferee was subject. The estate was not the transferee of a transferee. The estate was the original transferee. A legatee of the deceased to whom the estate was passed was also by *Section 280 (3) (f)* an original transferee."* (Italics ours.)

Again it said:

> "The Commissioner had the right *to assess the tax* against any transferee of a taxpayer who neglected to pay his taxes." (Italics ours.)

Again it said:

> "At the time, the statute which *authorized the assessment of a tax against the transferee* had not been enacted." (Italics ours.)

Again the Court said in stating the question involved:

> "May *a tax assessed against a transferee* levied within the time fixed by statute be enforced (1) against the legatee of said transferee in case the transferee died, or (2) against the executor of the will of said transferee in case the transferee died before *the act authorizing the assessment of a tax against a transferee* was passed?" (Italics ours.)

---

* One is not a transferee unless there has been transferred to him property of a taxpayer. No property of the taxpayer (Van Sicklen Co.) was transferred either to the estate or the legatee. Hence the Board of Tax Appeals was right in saying the estate was not liable, and the Court of Appeals wrong in assuming the statute imposed a liability upon it irrespective of the receipt of the taxpayer's property and defined it to be a transferee.

At the outset it may be stated that no attempt was ever made to collect this liability from the transferee, Charles H. Hulburd, during his lifetime, nor was any tax ever assessed against him or any proceeding against him even thought of, nor was any notice of the claim given the executors before their discharge.

The liability which *Section 280* does not create, but merely provides a new remedy for the enforcement, *is not a tax liability at all* as the Court of Appeals repeatedly states in its opinion. The *Senate Finance Committee* in its *Report on Section 280,* stated (R. 71):

> "In all the above cases *the transferee is not liable for the tax of the transferor,* but is by reason of the receipt of the assets subject to an independent *liability* in his own person and payable out of his own estate, *arising under* the *trust fund doctrine* or some similar theory." (Italics ours.)

From the above statement of the Senate Finance Committee as well as from the established principles of law, it is clear that the liability is not a tax liability and that the decedent was never liable for the tax of the Van Sicklen Company nor for any of its debts to the Government. If he was liable at all it was under the trust fund theory which permits the creditor to lay hold of the fund impressed with a trust, wherever located. Inasmuch as such a liability in its essence is inseparable from the trust fund, it depends upon tracing and specifically locating the fund impressed with the trust and it is obvious that it does not survive to executors, nor does it pass to legatees unless the trust fund has passed and can be traced into their hands and custody. This was not done in the case at bar. The Board of Tax Appeals said (R. 77):

> "The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its as-

sets and was dissolved prior to decedent's death, and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate."

The burden of proving otherwise was placed by the statute on the Commissioner in this proceeding and he failed to offer any evidence tending to show the contrary. Indeed, he must concede the above quoted statement of the Board to be true. He did not claim otherwise in the Court of Appeals and cannot claim otherwise here.

We emphatically challenge the Court's attention to the misconception of law involved in the theory that because the decedent would have been liable under the trust fund doctrine had he lived, his estate or legatees are liable even though they did not receive any property of the Van Sicklen Company or any property impressed with a trust. The reason they are not liable is because the liability of the decedent depends solely upon the trust fund doctrine. *United States v. Updike, 8 F. (2d) 913, 917; United States v. Garbutt, 35 F. (2d) 924, 925.* And the Courts in *Section 280* cases have applied the trust fund doctrine with all its limitations. *Commissioner v. Keller, 59 F. (2d) 499, 501.*

At Common Law where one received the assets of a dissolved corporation there was no liability. This situation caused Mr. Justice Story to discover the trust fund doctrine in equity. That is the only theory of equitable liability. There being no liability at common law in such situation, if any liability exists at law as distinguished from equity it is purely statutory and neither before the Board nor in the Court of Appeals did the Commissioner cite or rely upon any statute claimed to create liability

other than *section 280, supra.* Consequently there is no liability at law and any liability in equity must depend on the trust fund doctrine.

A liability under the trust fund doctrine is inseparable from the fund impressed with the trust fund and if that fund does not pass to the executor or the legatee the liability does not pass. *Kessig v. Lea, 168 Minn. 14; 196 N. W. 655.* Where a decedent has received property impressed with a trust, his executors are only liable for such part of it as has actually come into their possession and not for the full amount received by decedent. *In re Reads Est., 253 N. Y. S. 648; 141 Misc. 716.* This is because a trust fund liability is inseparable from the trust property.

If the decedent had been liable for the tax of the Van Sicklen Company, as the Court of Appeals, contrary to the statement in the Senate Finance Committee report, erroneously assumed, this would be another and a different kind of liability and a different question would be presented.

IN HOLDING THAT EXECUTORS WERE LIABLE THE DECISION IN THE CASE AT BAR IS IN CONFLICT WITH DECISIONS OF THE SIXTH AND NINTH CIRCUITS.

In *Nauts v. Clymer, 36 F. (2d) 207 (C. C. A. 6th)* the facts were as follows:

On March 15, 1920, the decedent filed his 1919 return. Hence the statute of limitations would have expired March 15, 1925. The Commissioner mailed a 60-day letter on December 10, 1924, which if it was a sufficient notice would have extended the statute of limitations for

sixty days or until May 15, 1925, under the provisions of *Section 277 of the Revnue Act of 1924 (26 U. S. C. A. Sec. 1057 and Note)*. The tax assessed April 3, 1925. The plaintiff, legatee of $300,000 under the will, paid the tax and brought suit to recover it on the ground that it was assessed after the statute of limitations had run. The case turned upon the sufficiency of the notice to extend the statute. If it extended the statute, the assessment was in time, otherwise it was not. The notice was addressed as follows:

"George H. Marsh, Deceased,
L. C. Morgan, Executor,
Van Wert, Ohio."

When the notice was sent the executor had been discharged and the estate administered as in the case now at bar. The Circuit Court of Appeals for the Sixth Circuit affirmed the District Court and held that the notice was insufficient to extend the statute of limitations.

In the case at bar the notice was addressed as follows (R. 15):

"Estate of Charles H. Hulburd,
c/o De Forest Hulburd,
86 East Randolph Street,
Chicago, Illinois"

This notice read in part as follows:

> "As provided by *Section 280 of the Revenue Act of 1926*, there is proposed for assessment against the estate the sum of $24,000.00, constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois. * * *"

At the time this notice was sent to the estate it was not in existence and De Forest Hulburd and the other executor had been discharged as was the case in *Nauts v. Clymer*.

The case of *Nauts v. Clymer* has been cited in such a way as to indicate concurrence therein by the Circuit Court of Appeals for the Second Circuit in *Lieberman's Committee v. Commissioner, 54 F. (2d) at page 530.*

In the opinion of the Board of Tax Appeals holding against petitioner on the issue of statute of limitations, the decision of the Circuit Court of Appeals for the Sixth Circuit in *Nauts v. Clymer* is "distinguished" by the following *ipse dixit* of the Board:

> "While indicating the deficiency notice mailed appeared insufficient, having been addressed to only one of the three executors who had distributed the estate and been discharged, the Court rather emphasized the fact that the limitation expired before the assessment of April 3, 1925."

This overlooks the point that *the limitation would not have expired before the assessment of April 3, 1925, if the notice had been sufficient* and that in order to conclude that the limitation had expired before the assessment of April 3, 1925, it was necessary for the Court to squarely hold that the notice of deficiency was insufficient to extend the statute of limitations because of the discharge of the executor and settlement of the estate prior to its mailing and the Court did so hold.

Obviously the case of *Nauts v. Clymer* cannot be distinguished from the case at bar unless the fact that here the discharged executor appealed to the Board of Tax Appeals (and in the very petition on appeal pleaded his discharge and annexed thereto a certified copy of it (R. 5-9)) put him in a worse position than if he had paid the tax and then sued to recover it, as was done in *Nauts v. Clymer.* Such a construction of the statute "is not consistent with the great remedial purposes of the legislation creating the Board of Tax Appeals" (quoted from

Helvering v. Taylor, 293 U. S. ....), which was that one might have an opportunity to litigate a question before paying the tax in the same way that hitherto he could litigate it after paying the tax. These executors did not mislead or deceive the Commissioner because they pleaded their discharge, the distribution of the estate and set up the statute of limitations in the petition on appeal filed with the Board of Tax Appeals (R. 6). The effect of the Court of Appeals' decision on this point is to put them in a worse position because they appealed than they would have been in had they not appealed.

Furthermore, a bare reading of the decision of the Circuit Court of Appeals for the Ninth Circuit, in *Lindley v. U. S., 59 F. (2d) 336*, discloses that it is in conflict with the decision in the case at bar on the question of the liability of discharged executors for a tax not asserted against them until after their discharge.* Nor can any distinction be found between the liability of the executor there and here in any alleged difference between the statutes of California relative to executors and those of Illinois. The order of the State Court discharging the executors in the case at bar is not subject to collateral attack. *(Simmons v. Saul, 138 U. S. 439; Stovall v. Banks, 10 Wall. 538)*, and so far as the law of Illinois goes this belated claim could not have been successfully pressed against the estate now or at the time it was first made. *(People v. Small, 319 Ill. 437, 447;* see also *Descent & Distribution, 18 Corpus Juris, Sec. 307, page 693.)* Although the Government argued otherwise in the Court of Appeals that Court did not and could not so hold.

* In that case the executor was held liable as a legatee because it was proved that he actually received the money claimed by the Government. There was no such proof in the case at bar.

IF THE STATUTES INVOLVED BE CONSTRUED TO IMPOSE RETROACTIVE LIABILITY THEY VIOLATE THE FIFTH AMENDMENT.

If the statutes involved in the case at bar are correctly construed by the Circuit Court of Appeals as imposing retroactive liability upon estates defunct and out of existence long before their enactment and levying a tax upon legatees who have not been enriched by the receipt of the property of the transferor taxpayer, then it is submitted they are obviously arbitrary and capricious and violate the *Fifth Amendment to the Federal Constitution.* There is no power granted ot Congress to levy a tax *ex nihilo* and on account of nothing. As the Board of Tax Appeals properly observed it would be an unheard of anomaly "to recognize an existing transferee liability of a non-existing transferee" (R. 78).

CONCLUSION.

On the merits *section 280* did not create a liability. In stating that it did the decision of the Court of Appeals in the case at bar is in direct conflict with decisions of the Second and Fifth Circuits and with express statements of the Congressional Committees in charge of the legislation, made in their reports to Congress. (See also *Phillips v. Commissioner, 283 U. S. 589, 593.)*

This section merely provides a procedure for the enforcement of any pre-existing liability "at law or in equity". No principle of the common law or no statute has been cited in this case by the Commissioner, imposing any liability. If there is a liability in equity it must depend upon the trust fund theory and inasmuch as the petitioner here never received any property impressed with a trust there is no such property for the Government to recover and hence the Board of Tax Appeals was correct in holding that petitioner was not liable and the Circuit Court of Appeals was wrong in holding that he was.

Petitioner had been discharged as executor by an order of the State Court entered before he had any notice of the Government's claim. In such case *Section 3467 of the Revised Statutes* did not render him liable. (In *U. S. C. A., Title 31, Sec. 192*, this section is fully annotated and the decisions, including that of Chief Justice Marshall, are uniform in holding that there must be notice of the claim prior to discharge before an executor may be held liable under this section.)

In holding the *Revenue Act of 1926* retroactively applicable to executors who had ceased to be such before its passage by lawful order of the Court discharging them, the decision in the case at bar is in conflict with the decisions of the Second and Ninth Circuits.

In reversing the decision upon a point not made before the Board of Tax Appeals the decision is in conflict with the decision of five Federal Courts of Appeal.

The decision of the Board of Tax Appeals, reported in *27 B. T. A. 1123* (R. 75-79), which we ask your Honors to read at this point, is manifestly correct and in harmony with the overwhelming weight of authority and the decision of the Court of Appeals is out of harmony with the weight of authority on the points heretofore pointed out. The conflict between the decision in this case and other Courts of Appeal on any one of the four important points upon which it conflicts would alone justify the allowance of the writ and *a fortiori* a conflict on all four of these points makes a review by this Court imperative.

For the foregoing reasons this writ should be granted.

All of which is respectfully submitted.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Building,
Chicago, Illinois,
Counsel For Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1935.

No. 39

DE FOREST HULBURD,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Seventh Circuit.

BRIEF FOR PETITIONER.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Counsel for Petitioner.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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IN THE

Supreme Court of the United States

October Term, 1935.

No. 39

DE FOREST HULBURD,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Seventh Circuit.

BRIEF FOR PETITIONER.

May It Please The Court:

On June 3, 1935 *(295 U. S. ——)* this Court granted the writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 90-100), published in *76 F. (2d) 736*, reversing a decision of the Board of Tax Appeals in favor of the petitioner, which decision is reported in *27 B. T. A. 1123.** (R. 76 to 80.)

* The Board by order severed the issues and tried the question of the statutes of limitations before deciding the question on the merits, but decided the limitation question against petitioner. 21 B. T. A. 23. (R. 68)

STATEMENT OF THE CASE.

The petitioner was on February 26, 1925 discharged as executor of the estate of Charles H. Hulburd, who died January 14, 1924. The other executor was Hugh McBirney Johnston, but he died pending the proceedings before the Board of Tax Appeals and no one was substituted in his place.

Petitioner's intestate, Charles H. Hulburd, more than four years before his death and in the year 1919 had received $8,000 as a liquidating dividend from the Van Sicklen Company and in this proceeding the respondent sought to pursue this $8,000 and take it for an alleged tax due from the Van Sicklen Company. This alleged tax arose out of the following facts: In the year 1919 the Van Sicklen Company, an Illinois corporation, sold all of its assets and business to the Van Sicklen Speedometer Company, a corporation of Delaware, and received as consideration therefor $250,000 in cash and 5,000 shares of the common stock of the vendee without par value, being $100.00 per share in cash and two shares of the common stock of the Delaware corporation for each outstanding share of the Illinois corporation. The Illinois corporation distributed the stock of the Delaware corporation and the $250,000 in cash to its stockholders (R. 84) and dissolved in September, 1919 (R. 39). An income and profits tax return was filed for the Illinois corporation for the fiscal year ended September 30, 1919, with the Collector of Internal Revenue at Chicago, Illinois, on December 31, 1919 and the tax shown due therein was paid (R. 37).

The Illinois corporation, the Van Sicklen Company, had commenced business with an authorized capital stock of $150,000 of which $90,000 was paid in, in property and the remainder in cash. On May 6, 1915, the authorized capital stock was increased to $250,000, the additional $100,000 being subscribed and paid for in cash (R. 31). Thus the investment in the Illinois corporation by its stockholders was $250,000, which investment and no more was returned to them in cash and in addition they received 5,000 shares of the common no par value stock of the Van Sicklen Speedometer Company. By reason of the failure of the Van Sicklen Company to return an income these 5,000 shares of no par value stock and pay tax thereon at the fair market value thereof claimed by the Commissioner, an additional tax in the amount of $227,872.06 plus a fraud penalty of $113,936.03 was assessed against it by the Commissioner of Internal Revenue on November 17, 1924 (R. 37), more than five years after its dissolution.* In any event taxable income on account of receipt of this stock could only have accrued to the Van Sicklen Company if the stock had a fair market value. The petitioners in their petition alleged that it had no fair market value (R. 14) and at the hearing the respondent abandoned the claim that it did (R. 39).

---

* On the question of whether any income arose on account of receipt of this no par value stock, see the 5 to 4 decision of this Court in **Marr v. United States, 268 U. S. 536**, and **Weiss v. Stearn, 265 U. S. 242.** Subsequent Revenue Acts expressly exempted such stock received in a reorganization from tax until sold. U. S. C. Title 26, Sec. 934 (2) (4), Sec. 112 (d) (1), Revenue Acts of 1928, 1932, 1934, Sec. 203 (e) (1) Revenue Acts of 1924 and 1926. Furthermore, the fraud penalty was not determined or assessed until after the corporation dissolved. A penalty is a personal punishment and dies with the person. That a penalty is not collectible from transferees where it is assessed after a corporation is dissolved, is held in G. C. M. 1126 C. B.VI-1, p. 117. See also L. O. 1091, C. B. I-1, p. 422, and authorities there cited.

However, inasmuch as the Van Sicklen Company had dissolved more than five years prior to this assessment there was no entity in existence to contest the tax and as a result the assessment was unheeded and unpaid.

By letter of April 16, 1924 (a few months before this assessment was made), the executors had advised the Commissioner of Hulburd's death and that they were acting as executors and requested him to make a determination of taxes due from Hulburd within one year, and by letter of April 20, 1925 (written five months after the making of the assessment against the defunct Van Sicklen Company), the Commissioner wrote the executors advising them that the case was closed, without making any mention of the claim involved in this case. These letters are set forth in the margin (R. 93).

The deficiencies mentioned in the letter of April 20, 1925, totalling $5,596.18, were assessed and were paid by the petitioner here and he deemed the case closed inasmuch as this letter of the Department so stated.

On February 26, 1925, the petitioner was discharged by the Probate Court as executor, and the estate declared

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"April 16, 1924.

Commissioner of Internal Revenue,
Washington, D. C.
Dear Sir:

Pursuant to your letter of April 14, 1924, to our attorneys, Messrs. Gardner and Carton, 76 West Monroe Street, Chicago, the undersigned DeForest Hulburd and Hugh McBirney Johnston as Executors of the Will of Charles H. Hulburd, deceased, hereby request that all taxes due on account of income received during the lifetime of said Charles H. Hulburd, deceased who died January 14, 1924, be determined and assessed within one year, in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921. A certified copy of our letters testamentary is enclosed herewith.

Yours respectfully,
(signed) DeForest Hulburd,
(signed) Hugh McBirney Johnston."

Encl.

settled and the Final Account of the executors showing how they had distributed the estate, approved (R. 65). One year after petitioner's discharge and after the distribution of the estate by them had been approved by the Probate Court, and on February 26, 1926, the Revenue Act of 1926, under which the proceeding in the case at bar was brought, was enacted. Eight months after its enactment the Commissioner first made this claim against the "Estate of Charles H. Hulburd" (R. 15).

The claim in he case at bar was made one year and eight months after petitioner's discharge as executor and

---

"Treasury Department
Washington

April 20, 1925.

IT:PA:1
FMA-106
Mr. DeForest Hulburd and Hugh McBirney Johnston,
Executors, Estate of Charles H. Hulburd,
c/o Gardner and Carton,
76 West Monroe Street,
Chicago.

Sirs:

Reference is made to your letter dated April 16, 1924, in which you requested that this office determine and assess all taxes due on the income received by the above-named decedent during his lifetime in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921.

In reply you are advised that an examination of the returns filed by Charles H. Hulburd for the years 1919 to 1921 inclusive discloses no further adjustments necessary for these years.

The audit of the returns for 1922 and 1923, as made by the Supervising Internal Revenue Agent discloses deficiencies of $804.00 and $472.50 respectively.

The return filed for th period January 1, 1924, to January 14, 1924, the date of the taxpayer's death, has been audited in this office. The correct tax liability is found to be $4,319.68, none of which has been assessed.

You are advised that the deficiencies totaling $5,596.18 will be listed at once for assessment and you will be further advised in a separate communication from this office.

Since the Revenue Act of 1924 is now in effect, the case has been closed under Section 277 (a) (3) of that Act.

Respectfully,
J. G. BRIGHT,
Deputy Commissioner,
By (signed) A. Lewis,
Head of Division."

after he had distributed the estate, in a notice of deficiency (R. 15) addressed as follows:

"Estate of Charles H. Hulburd,
c/o De Forest Hulburd,
86 East Randolph Street,
Chicago, Illinois,"

and claiming a liability as follows:

> "As provided by *Section 280 of the Revenue Act of 1926*, there is proposed for assessment against the estate the sum of $24,000.00, constituting its liability as a transferee of the assets of the Van Sicklen Company" (R. 15).

From this notice the petitioner appealed to the Board of Tax Appeals assigning as error that the Commissioner erred in proposing to assess the estate of Charles H. Hulburd as a transferee of the property of the Van Sicklen Company (R. 6 [e]) and alleging that the estate had been wholly distributed and settled and the petitioners duly discharged as executors (R. 7 [f]). The petition annexed as Exhibit "C" thereto, a copy of the order of the Probate Court discharging them as executors (R. 7, par. 5, and R. 26), which order was dated February 26, 1925 (R. 27). In the petition it was also alleged that no property of the Van Sicklen Company was possessed by Charles H. Hulburd at the time of his death or was transferred to or received by the petitioners as his executors or was at any time a part of or included in the estate of Charles H. Hulburd (R. 9). The petition also pleaded the statute of limitations and assailed the determination of tax against the Van Sicklen Company,

The Board of Tax Appeals in *27 B. T. A. 1123*, gave judgment on the merits for this petitioner, saying that

the claim in the above quoted notice of deficiency was against the estate as a transferee and (R. 78):

> "The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its assets and was dissolved prior to decedent's death and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate."

The Board of Tax Appeals also said that at the time of the enactment of the Revenue Act of 1926 and at the time respondent first made this claim, the estate of Charles H. Hulburd was not in existence and the petitioners were not executors and consequently there was at the time of the enactment of this Act no existing liability of non-existing entities, viz.: the estate or petitioners as executors. The Board said (R. 79):

> "We are of opinion that at the time the notice was mailed there was no liability of the estate or of the petitioners as executors. Both were at that time out of existence and it would be an anomaly to recognize an existing transferee liability of a non-existing transferee. *Section 280 of the Revenue Act of 1926* did not create new liabilities but only provided a new remedy for enforcing existing liabilities. *Phillips v. Commissioner, 283 U. S. 580.* No authority is cited for giving it a retroactive application as a remedy to enforce defunct liabilities or as reviving them."

From this decision of the Board the Commissioner appealed to the Circuit Court of Appeals for the Seventh Circuit and that Court held that De Forest Hulburd was liable as a legatee, notwithstanding he had received none

of the assets of the Van Sicklen Company, either as executor or legatee, and further held him liable as executor because he had not notified the Commissioner of Internal Revenue of his discharge. *(76 F. (2d) 736.)*

As the Circuit Court of Appeals stated in its opinion (R. 94), the question of the liability of the petitioner as a legatee had not been raised by the Commissioner before the Board of Tax Appeals.* Neither was it raised in the above quoted notice of deficiency (R. 15) which was addressed solely to the estate and which solely asserted a liability as a transferee against the estate alone, as fully appears from the quotation from it on page 6 hereof, nor was it made in the assignment of errors in the petition for review of the Board's decision (R. 86). It was raised for the first time in the Commissioner's brief filed in the Circuit Court of Appeals on January 27, 1934.

ERRORS TO BE URGED.

The petitioner urges that the Circuit Court of Appeals erred:

(1) In holding petitioner liable and reversing the Board's decision on a ground neither asserted by the Commissioner in the notice of deficiency nor before the Board of Tax Appeals, nor in the assignment of errors in his petition for review of the Board's decision;

(2) In holding that *Section 281 (a)* and *(b) of the Revenue Act of 1926* was retroactive and imposed liabilities upon persons who had been discharged as executors long prior to its enactment;

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* The question of personal liability of the executor under Section 3467 R. S. was expressly abandoned before the Board by respondent (R. 80).

(3) In holding that *Section 280 of the Revenue Act of 1926* created a liability and that thereunder petitioner was liable;

(4) In holding that the statute of limitations was tolled by the deficiency notice sent to the executors on October 27, 1926, or a year and eight months after their discharge;

(5) In failing to hold that the sections of the Act as construed by it violated the *Fifth Amendment to the Federal Constitution;*

(6) In reversing the decision of the Board of Tax Appeals.

STATUTES INVOLVED.

Revenue Act of 1926, C. 27, 44 Stat. 9.

Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in *subdivision (d) or (f)* of this *section* or in *sections 279, 282, or 1001,* no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in Court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Nothwithstanding the provisions of *section 3224 of the Revised Statutes* the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is

in force may be enjoined by a proceeding in the proper Court. *(U. S. C. App., Title 26, Sec. 1048.)*

Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in Court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war profits tax Act.

(2) The liability of a fiduciary under *section 3467 of the Revised Statutes* in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a Court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods, then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under *subdivision (a) of section 274* to the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee. *(U. S. C. App., Title 26, Sec. 1069.)*

Sec. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in *section 280*, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under *subdivision (a)* or *(b)* shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under *subdivision (a)* or *(b)*, notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. *(U. S. C., App., Title 26, Sec. 1070.)*

Revenue Act of 1928, Section 602 (adding *section 912 to Revenue Act of 1924*), *45 Stat. 872, 873 (26 U. S. C. A. Sec. 1229)*.

Burden of Proof.

"In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax."

Revised Statutes, Sec. 3467.

"Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid. *(U. S. C., Title 31, Sec. 192.)*"

SUMMARY OF ARGUMENT.

When the *Revenue Act of 1926* was enacted the executors had been discharged and the estate as such was out of existence. Consequently it had no existing liability and

the *1926 Act* merely provided a procedure for the enforcement of a then existing liability at law or in equity. Recognizing an existing liability against an estate not in existence is like recognizing an existing liability against a dead man—an anomaly unknown to the law. The former executors were not personally liable under *section 3467 of the Revised Statutes* because this section has been uniformly construed by the Courts to require notice to executors of a claim of the United States before personal liability may be invoked thereunder.

Even if the estate had been in existence and if the executors had been such at the time of the enactment of the *Revenue Act of 1926* and at the time of the mailing of the notice of deficiency, the estate would not have been liable for the reason that no property of the Van Sicklen Company was at any time received by it and a liability under the trust fund doctrine depends solely upon following and identifying trust property and does not exist apart from the trust property. It is a liability attaching to the *res* or strictly in *rem* and not in *personam*.

The claim against the legatee was not made in the notice of deficiency nor before the Board of Tax Appeals nor in the assignment of errors in the petition for appeal and should not have been considered by the Circuit Court of Appeals. Moreover, when first made in the Commissioner's brief in the Circuit Court of Appeals in January 1934 the right to make it was barred by limitation. Even if this claim had been properly before the Court there was no liability on the part of petitioner as legatee because he did not receive any of the trust property.

In any event the notice of deficiency was insufficient to extend the statute of limitations as to a claim against the estate.

ARGUMENT.

THE NATURE OF THE LIABILITY UNDER SECTION 280.

Section 280 of the Revenue Act of 1926 did not create or define any liability. It merely provided "a new remedy for enforcing the existing liability at law or in equity." *(Phillips v. Commissioner, 283 U. S. 589, 594.)*

The Circuit Court of Appeals in its opinion in the case at bar said:

> "The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executor as a fund impressed with a trust. He does not and cannot, therefore, base his right to assess the tax on any trust fund theory *other than that created and defined by the statute.*" (Italics ours.) (R. 96.)

The entire opinion of the Circuit Court of Appeals proceeds upon the theory squarely stated in the above quotation therefrom that *Section 280* creates and defines a liability and imposes a tax. The Court said:

> "Upon the death of a transferee, his estate becomes liable for the tax* to which the deceased transferee was subject. The estate was not the transferee of a transferee. The estate was the original transferee. A legatee of the deceased to whom the estate was passed was also by *Section 280 (3) (f)* an original transferee." (R. 98, 99.)

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* G. C. M. 6343 published in C. B. VIII-2, p. 220, cited with approval in **Philadelphia Rapid Transit Co. v. U. S., 10 F. Supp. 591, 600,** recognizes that liability under Section 280 is not a tax liability.

The Court seemed to overlook the very meaning of the word "transferee," which necessarily means one to whom property has been transferred and while it is defined by the statute to include "heir, legatee, devisee, and distributee," manifestly it cannot and is not intended to include such persons unless property of the taxpayer has been transferred to them. *Whitney 26 B. T. A. 212, 217.* (acquiesced in C. B. XIII-2, p. 19). That *section 280* does not impose a tax on a transferee or make a transferee liable for the tax of the transferor was expressly stated by the Senate Finance Committee in its Report on *section 280*, as follows (quoted by the Board of Tax Appeals, R. 72, 73):

> "In all of the above cases the *transferee is not liable for the tax of the transferor*, but is by reason of the receipt of the assets subject to an independent liability in his own person and payable out of his own estate *arising under the trust fund doctrine* or some similar theory." (Italics ours.)

That this section does not define or create any liability or change a pre-existing liability is made plain from the statements in the Reports of the Committees having charge of the legislation. The Conference Report on the *Revenue Act of 1926, 69th Congress, First Session, Report No. 356*, states at page *43*:

> "*Without in any way changing the extent of such liability of the transferee under existing law*, the amendment enforces such liability (whether in respect of the tax as originally returned by the taxpayer or a deficiency therein) in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the Courts." (Italics ours.)

The Senate Finance Committee Report (which is quoted in the opinion of the Board of Tax Appeals at page 73 of the Record) states as follows:

> "It is the purpose of the Committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the Act for the enforcement of tax deficiencies. *It is not proposed, however, to define or change existing liability.* The section merely provides that *if the liability of the transferee exists under other law*, then that liability is to be enforced according to the new procedure applicable to tax deficiences."* (Italics ours.)

That *Section 280* does not create and does not define any liability has been uniformly recognized by Courts in cases other than the one at bar. *Exchange National Bank of Shreveport v. United States, 65 F. (2d) 316 (C. C. A., 5th); Commissioner v. Oswego Falls Corporation. 71 F. (2d) 673, 676 (C. C. A., 2nd)*

From this it follows that the sections of the *Revenue Act* merely provide a procedure to enforce an existing liability of a transferee if such liability exists under law apart from the *Revenue Act*

In *G. C. M. 6343.* published in *C. B. VIII-2, page 220.* the General Counsel for the Bureau of Internal Revenue states:

> "An assessment under *section 280* cannot be regarded as creating a liability on the part of the transferees greater than that which would have been created by a judgment obtained against them under the 'trust fund theory' (applied in *United States v. Boss & Peake Automobile Co., 285 Fed. 410, Treasury Deci-*

* This report is also quoted in **Wire Wheeled Corporation of America, 16 B. T. A. 737, at page 742, which was affirmed by the Circuit Court of Appeals for the Second Circuit in 46 F. (2d) 1013.**

sion 3442 (C. B. II-1. 43), and in other similar decisions), which is that where, upon dissolution of a corporation, its assets are distributed among the stockholders, the latter become liable to creditors of the corporation in an amount not to exceed the value of the property received by them. This principle applies to taxes due the Government upon the dissolution of a corporation.

"*Section 280* provides that the amount of the liability, at law or in equity, of a transferee, *in respect of the tax imposed upon the transferor*, shall be assessed. Since the individual against whom the assessments under the provisions of *section 280 of the Revenue Act of 1926* were made *were not technically taxpayers* (the transferor corporation alone being such in this case), *but were merely liable as transferees for the payment of the transferor corporation's tax, and since the statute does not change or make their liability a tax liability*, but simply provides for the assessment of the amount of a liability at law or in equity, *section 284 of the Revenue Act of 1926*, providing that where there has been an overpayment of tax the amount of such overpayment shall be credited against any tax then due from the taxpayer, is no authority for crediting overpayments by individual taxpayers against the amounts of their liability at law or in equity assessed against them under *section 280* of the Act." (Italics ours.)

Such existing liability of "a transferee of property of a taxpayer" "at law or in equity" only existed in equity under the trust fund doctrine* and at law in certain cases by virtue of the provisions of statutes of some of the states.

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* Commissioner v. Keller, 59 F. (2d) 499; United States v. Updike, 8 F. (2d) 913, 917; United States v. Garbutt, 35 F. (2d) 924, 925; Whitney, 26 B. T. A. 212, 216, and cases cited therein on page 217.

THERE IS NO AUTHORITY IN THE REVENUE ACT OF 1926 FOR PROCEEDING UNDER SECTION 280 AGAINST ESTATES DEFUNCT AT THE TIME OF ITS ENACTMENT.

Section 280 deals with the existing liability of a transferee. If a transferee is dead, certainly he may not be proceeded against. If an estate is not in existence, certainly it may not be proceeded against. If executors are in fact no longer executors, they may not be proceeded against as executors although they may be personally liable under certain circumstances.

For the convenience of the Court we requote the pertinent provisions of the *Revenue Act of 1926,* (quoted on pages 10 and 11 hereof), which conferred jurisdiction on the Board of Tax Appeals in these cases:

> "*Sec. 280 (a) (1).* The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.
>
> *Sec. 280 (a) (2).* The liability of a fiduciary under *section 3467 of the Revised Statutes* in respect of the payment of any such tax from the estate of the taxpayer.
>
> Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax."

It is conceded that the estate was not "a transferee of property of the taxpayer" and, as hereinafter pointed out, any claim to liability under *Section 3467 of the Revised Statutes* was abandoned before the Board of Tax Appeals so that the two above quoted provisions of the statute may be put to one side.

The only other provision we can find in the *Revenue Act of 1926* upon which this proceeding may be sought to be based is the following provision of *Section 281 (b)*:

> *"Sec. 281 (b).* Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in *section 280*, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated."

It is fully pointed out on pages 21 to 22 of this brief that this section of the *Revenue Act of 1926* was not retroactive and hence did not authorize this proceeding because the executors had been discharged and the estate distributed long prior to its enactment. If we are correct in this, it is unnecessary to proceed further to demonstrate that the decision of the Circuit Court of Appeals must be reversed and the decision of the Board of Tax Appeals affirmed. The Board of Tax Appeals in its opinion said (R. 79):

> "We are of opinion that at the time the notice was mailed there was no liability of the estate or of the petitioners as executors. Both were at that time out of existence, and it would be an anomaly to recognize an existing transferee liability of a non-existing transferee. *Section 280 of the Revenue Act of 1926* did not create new liabilities, but only provided a new remedy for enforcing existing liabilities. *Phillips v. Commissioner, 283 U. S. 589.* No authority is cited for giving it a retroactive application as a remedy to enforce defunct liabilities or as reviving them."

On November 17, 1924, when the Commissioner made his assignment against the Van Sicklen Company, he knew

that the Van Sicklen Company had sold its assets to another company and had dissolved and distributed its assets for he based his assessment on that very sale. On April 16, 1924, the executors had written him notifying him that they were executors and requesting determination of taxes within one year (R. 93). Thus seven months before he made the assessment against the defunct Van Sicklen Company he had notice of Hulburd's death and that the petitioner was executor of his estate. On April 20, 1925, aproximately five months after his assessment against the defunct Van Sicklen Company, he wrote the petitioner advising him that the tax case had been closed and giving him no notice of the claim sought to be enforced here (R. 93). In these circumstances the Board of Tax Appeals appropriately observed (R. 79):

> "With full knowledge of his opportunity and ample time within which to use it, the Commissioner took no step to present a claim, but permitted the estate to be closed and the executors discharged without knowledge of the possible liability."

It is elementary that a judgment against one in his capacity as executor is a judgment payable only out of the assets of the estate in his possession in that capacity. When these assets have been duly and regularly distributed and the distribution approved by the Court and the executors discharged, such a judgment is an obvious futility and no authority can be cited for the maintenance of a proceeding against executors as executors. A case recognizing these fundamental principles is *Lindley v. United States, 59 F. (2d) 336 (C. C. A., 9th).**

* In that case the legatees were sued as well as the executors and while the Court held the executors were not liable it held that the legatees were liable because the trust fund was traced into their hands. In the case at bar the proceeding was solely against the estate and not against the legatee and here the legatee received no property of the taxpayer—the Van Sicklen Company.

THE RESPONDENT WAS NOT PERSONALLY LIABLE.

The Circuit Court of Appeals in its opinion in the case at bar thought that *Section 281 (b) of the Revenue Act of 1926 (26 U. S. C. A., Sec. 1070)* was applicable (R. 98). But petitioner had been discharged as executor one year before the enactment of this section. The Board of Tax Appeals in its opinion in the case at bar said (R. 80):

> "*Section 280, Revenue Act of 1926*, and *Section 312, Revenue Act of 1932*, were not in effect during the existence of this estate and imposed no duties upon the executors here. The decisions under those sections are therefore not pertinent."

In construing *Section 281** to be retroactive the opinion of the Circuit Court of Appeals in the case at bar is on this point squarely in conflict with the decision of the Court of Appeals for the Second Circuit in *Liberman's Committee v. Commissioner, 54 F. (2d) 527*, wherein the Court at page *529* quotes the statute and the Treasury Regulation thereunder and says:

> "Secondly, and this seems to us a conclusive answer to the contention, *section 281 (a), 26 U. S. C. A., Sec. 1070 (a)*, speaks prospectively from the date of its enactment, February 26, 1926 (see *section 286, (26 U. S. C. A., Sec. 931, note)*), and relates only to actual fiduciaries who thereafter give notice to the Commissioner that they are acting as such."

The same observation would, of course, apply to *Section 281 (b)*.

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* This section, set out on page 19 hereof, does not impose a personal liability but expressly provides "the liability shall be collected from the estate".

The opinion in the case at bar makes no attempt to distinguish this case. The Circuit Court of Appeals for the Second Circuit and the Board of Tax Appeals in the case at bar are manifestly correct and the Circuit Court of Appeals for the Seventh Circuit is manifestly wrong in giving this statute retroactive effect. Otherwise any person who had been an executor and was discharged prior to the date of the enactment of the *Revenue Act of 1926* would be made liable by that Act unless he thereafter gave notice that he was no longer acting as executor. If this is the law, thousands of executors discharged years ago are still liable. Such a construction is opposed to the familiar rule against retroactive construction many times stated by this Court. (See *Union Pacific R. R. Co. v. Laramie Stock Yards Co., 237 U. S. 190, 199.)* There are no words either in the statute quoted or in the regulation promulgated thereunder* purporting to be retroactive and to apply to estates closed prior to its passage, and hitherto no Court has so construed it. Nor had the Treasury Department so construed it.

Other than the provisions of the statute which have been discussed above, there is one other statute which is pertinent and that is *Section 3467 of the Revised Statutes* (quoted on page 12 of this brief).** The notice of deficiency makes no claim under *Section 3467 of the Revised Statutes* and such claim was not only not made but was expressly abandoned before the Board of Tax Appeals. The Board said:

> "The respondent disclaims any attempt in this proceeding to invoke such a remedy" (R. 80).

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* Article 1292, Reg. 69, quoted in Liberman's Committee, 54 F. (2d) 527, at page 529.

** This is the Federal statute designed to provide for personal liability of executors.

In its reply brief in the Circuit Court of Appeals (p. 8 thereof), the Government expressly stated that it did not rely in this case upon *Section 3467.***

Nevertheless, on the merits it is clear that petitioner is not liable under *Section 3467 of the Revised Statutes* because he had no notice of the Government's claim during the time he was executor.

That this section creates no lien is clear from the decision of the Circuit Court of Appeals for the Second Circuit in *United States v. Western Union Telegraph Co., 50 F. (2d) 102,* and cases therein cited.

This section is set out and fully annotated in *Title 31, Section 192, U. S. C. A.,* and from these annotations, under the healing "Notice of Debt," it appears that an executor is not liable unless he received notice of the claim of the Government during the time he was executor. It was so held in *United States v. Clark, Fed. Cas. No. 14,807,* decided in 1826.

In *United States v. Fisher, 2 Cranch, 358; 2 L. Ed. 304,* no less an authority than Chief Justice Marshall said:

> "I only say for myself, as the point has not been submitted to the Court, that it does not appear to me to create a *devastavit* in the administration of effects and would require notice in order to bind the executor, or administrator or assignee."

** Review is restricted to questions and issues made and considered in the Court below and there decided. It is further limited to questions and errors which have been properly saved for review as shown by the record. **Longdorf's Cyclopedia of Federal Procedure, Vol. 6, Section 2973.** Defenses not made below are ordinarily not considered—**Sec. 2974.** Proper assignments and specifications of error are essential to review of questions on appeal—**Sec. 2976.**

It is obvious that if the law were otherwise no one could safely become an executor or administrator because years after his discharge the Government might present a claim against him, notwithstanding he had given the Government notice that he was executor and requested it to present its claim and it presented a claim but omitted from that presentation another and different claim presented for the first time years after the estate had been closed and the assets distributed.

The statement of Chief Justice Marshall and the decision in *United States v. Clark, supra,* were quoted and followed in *United States v. Eggleston, Fed. Cas. No. 15,027,* decided March 5, 1877. The *Clark case* was decided in 1826 and *Section 3467* had been re-enacted many times since, and if Congress had meant the law to be different than it has been judicially construed since 1826, it certainly would have amended it. (Compare *Heald v. District of Columbia, 254 U. S. 20, 23.)* Furthermore, the contrary construction would place a concealed danger in the way of one undertaking to become an executor and render it an undertaking from which prudent men might well shrink.

In this connection what is hereinafter said about the right of the Circuit Court of Appeals to consider a point not made before the Board of Tax Appeals is also pertinent, but whether it has the right or not, the foregoing shows that there is no liability in the case at bar under *Section 3467 of the Revised Statutes,* because to give rise to liability thereunder there must be notice of the Government's claim prior to the executors' discharge under the uniform and long continued judicial construction of that section.

EVEN IF THE ESTATE HAD BEEN IN EXISTENCE AND IF THE EXECUTORS HAD BEEN SUCH AT THE TIME OF THE ENACTMENT OF THE REVENUE ACT OF 1926 AND AT THE TIME OF THE MAILING OF THE NOTICE OF DEFICIENCY IN THE CASE AT BAR, THE ESTATE WOULD NOT HAVE BEEN LIABLE BECAUSE NO PROPERTY OF THE VAN SICKLEN COMPANY WAS RECEIVED BY IT.

The burden of proof by statute was upon the Commissioner of Internal Revenue. The words of the statute are *(Revenue Act of 1928, Sec. 602)* (adding *Section 912* to *Revenue Act of 1924) 45 Stat. at L. 872, 873 (26 U. S. C. A., Sec. 1229)):*

> "In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer."

The Commissioner utterly failed to meet the burden of proof because he failed to show that petitioner was liable "as a transferee of property of a taxpayer." The Board of Tax Appeals in its opinion said (R. 78):

> "The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its assets and was dissolved prior to decedent's death, and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate."

The correctness of this statement of the Board was not and cannot be challenged but must be conceded by the respondent.

The Circuit Court of Appeals said (R. 96):

> "The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executors as a fund impressed with a trust. He does not and cannot, therefore, base his right to assess the tax on any trust fund theory other than that created and defined by the statute."

As we have pointed out, the statute does not create and define any liability, as the Circuit Court of Appeals in the above quotation erroneously assumed, and inasmuch as the Commissioner failed to sustain the burden of proof imposed upon him by the statute the decision of the Board of Tax Appeals was correct and should not have been reversed by the Circuit Court of Appeals. To be liable it was necessary for the alleged transferee to have received property of the taxpayer. *People's Industrial Life Ins. Co. v. United States, 29 F. (2d) 650, (C. C. A. 5th).*

To say that a liability under the trust fund doctrine survives apart from the property sought to be impressed with a trust, is to overlook the essential nature of a liability under the trust fund doctrine, which is a liability in *rem*, attaching to the *res* and not a liability in *personam*.

A LIABILITY UNDER THE TRUST FUND DOCTRINE DOES NOT SURVIVE TO EXECUTORS WHO HAVE RECEIVED NO PROPERTY IMPRESSED WITH A TRUST.

At Common Law where one received the assets of a dissolved corporation, there was no liability. This situation caused Mr. Justice Story in *Wood v. Dummer, 30 F. Cas.*

17944, to discover the trust fund doctrine in equity.* That is the only theory of equitable liability. There being no liability at common law in such situation, if any liability exists at law as distinguished from equity it is purely statutory, and neither before the Board nor in the Court of Appeals, nor in his answer to the petition here, did the Commissioner cite or rely upon any statute claimed to create liability other than *section 280, supra.* Consequently there is no liability at law and if any liability exists in equity it arises out of the trust fund doctrine.

A liability under the trust fund doctrine is inseparable from the fund impressed with the trust and if that fund does not pass to the executor or the legatee the liability does not pass. *Kessig v. Lea, 168 Minn. 14; 196 N. W. 655.* Where a decedent has received property impressed with a trust, his executors are only liable for such part of it as has actually come into their possession and not for the full amount received by decedent. *In re Read's Est., 253 N. Y. S. 648; 141 Misc. 716.* This is because a trust fund liability from its essential nature is inseparable from the trust property.

THE CLAIM AGAINST PETITIONER AS A LEGATEE WAS NOT PROPERLY BEFORE THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals in its opinion said:

> "The Commissioner did not raise and the Board did not pass upon the question of liability of a legatee or beneficiary as a statutory transferee." (R. 94.)

* This doctrine has never been discovered or applied by the Judiciary of England. In many American states it has been repudiated. O'Bear Jewelry Co. v. Volfer, 106 Ala. 205; Crawfordsville National Bank v. Dovetail Body Co., 143 Ind. 550; Hospes v. North Western Mfg. Co., 48 Minn. 174.

The following cases hold that the Circuit Court of Appeals in appeal from the Board of Tax Appeals has no right to reverse the decision of the Board on a question not presented or urged before the Board: *Helvering v. J. L. Brandeis & Sons, 75 F. (2d) 487, 489 (C. C. A. 8th); Tulsa Tribune Co. v. Commissioner, 58 F. (2d) 937, 940 (C. C. A. 10th); Glassell v. Commissioner, 42 F. (2d) 653 (C. C. A. 5th); Hartley v. Commissioner, 72 F. (2d) 352 (C. C. A. 8th); Atkins Estate v. Lucas, 36 F. (2d) 611, 614 (App. D. C.); Tricou v. Helvering, 68 F. (2d) 280, 286 (C. C. A. 9th).*

The opposite view is taken in *Helvering v. General Utilities & Operating Company, 74 F. (2d) 972, 976 (C. C. A. 4th)* (now pending in this Court) and other decisions of the same Court.

But regardless of which of these views is the correct one there is another vitally important question not present in those cases but presented here. Not only did the Commissioner fail to raise the question of the liability of petitioner as a legatee before the Board of Tax Appeals, *but he did not raise it in the notice of deficiency* which is addressed only to the estate and not to the legatee and which is a claim solely against the estate (R. 15). As pointed out by the Circuit Court of Appeals (R. 97), the statute required a claim under *Section 280* to be made by the Commissioner "in no case later than one year after the enactment of this Act" (R. 92), which was February 26, 1927. No claim was made against the legatee until it was first made in the Government's brief filed in the Circuit Court of Appeals on January 27, 1934. It was then manifestly too late to first advance this new and novel claim and to advance it against a different person. The notice of deficiency was addressed:

"Estate of Charles H. Hulburd,
c/o De Forest Hulburd." (R. 15.)

In this notice there was no word about any claim against the legatee. Would a notice addressed to one Justice of this Court in care of another Justice which contained nothing in its context concerning a tax deficiency claim against the Justice in whose care it was addressed, be sufficient to extend the statute of limitations so as to permit a claim to be timely made seven years later against the Justice in whose care the notice was addressed? Obviously not.

THE PETITIONER WAS NOT LIABLE AS A LEGATEE ON THE MERITS BECAUSE NO PROPERTY OF THE VAN SICKLEN COMPANY WAS AT ANY TIME TRANSFERRED TO HIM.

In the case at bar the respondent merely proved that Charles H. Hulburd in 1919 received $8,000 from the Van Sicklen Company. He did not trace any of this money into the hands of the executors or into the hands of this petitioner, who as legatee is one step farther removed from Charles H. Hulburd than his executors. Between 1919 and the date of his death in 1924, Charles H. Hulburd very likely did and for aught that appears spent the $8,000 which he received from the Van Sicklen Company in 1919, for current expenses during the period of approximately five years between its receipt and his death. From the mere fact that his legatee years afterwards received $20,685.79 in cash, it cannot be assumed that the $8,000 received in 1919 by the decedent from the Van Sicklen Company, or any part thereof, was included in this sum. This principle of law is well established. A statement of it appears in the Article on *"Trusts"* in *65 Corpus Juris, paragraphs 889-900,* and particularly in *paragraph 900.* In *St. Louis & S. F. R. Co. v. Spiller, 274 U. S. 304,* this Court said, at page *310:*

"The money was not earmarked. It was mingled when collected with other money received from operation. And no special account was kept of it, The latest exaction occurred five years before the appointment of the receivers. The assertion that the money collected can be traced into the receivers' hands is confessedly without any support except the stipulated fact that throughout the ten years which elapsed between the earliest exaction and the transfer of the properties to the new company, the old one and the receivers had, at all times, in the several banks on which checks for current expenses were drawn, a working balance, in the aggregate, largely in excess of Spiller's claim. Such a showing fails to bring the present case within the rule by which, when trust funds are mingled with others, the *cestui* may assert an equitable lien upon the mingled mass to the extent of his contribution thereto. *American Can Co. v. Williams, 101 C. C. A. 634; 178 Fed. 420, 423; Re: A. D. Matthews' Sons, 151 C. C. A. 635; 238 Fed. 785, 787.* An illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears, all the money illegally exacted may have been spent for current operating expenses."

The last sentence of this quotation applies to this phase of the case at bar. Because of the failure of the proof to trace any of the assets of the Van Sicklen Company into the hands of this petitioner no property in his hands can be subject to a trust and be said to belong to creditors of that company. *People's Industrial Life Ins. Co. of La. v. United States, 29 F. (2d) 650, (C. C. A., 5th).*

THE NOTICE OF DEFICIENCY WAS INSUFFICIENT TO EXTEND THE STATUTE OF LIMITATIONS.

When the notice of deficiency was addressed to "Estate of Charles H. Hulburd" there was no such entity in existence and when the appeal was filed by the Executors they were not Executors and had no right to act as such and no right to file the appeal and it should have been dismissed for want of jurisdiction. In *Lieberman's Committee v. Commissioner, 54 F. (2d) 527, (C. C. A., 2nd),* the Court in reaching this conclusion said at page *530:*

> "The Committee's powers as fiduciaries had ceased by local law and not being within *Section 231(a)* they had no right to apply to the Board, hence the Board was without jurisdiction to redetermine the deficiencies in qestion, and the petition should have been dismissed."

The petitioners in their petition set out that the estate had been wholly distributed and that they had been discharged as exectuors (R. 7, par. 5 (a)). They annexed to the petition a copy of their discharge (Exhibit C, R. 26, 27). They thus put the Commissioner on notice and the Board on notice of the situation and rendered pertinent the following observation in the case of *Lieberman's Committee,* at page *529:*

> "That the Commissioner being charged of knowledge of the local law, he must be held to have known that the Committee's authority had ceased."

In an Amended Petition, petitioners specifically pointed out the effect on jurisdiction, to which these facts alleged in the original petition, gave rise (R. 15).

In *Nauts v. Clymer, 36 F. (2d) 207 (C. C. A., 6th)*, the facts were as follows:

On March 15, 1920, the decedent filed his 1919 return. Hence the statute of limitations would have expired March 15, 1925. The Commissioner mailed a 60-day letter on December 10, 1924, which if it was a sufficient notice would have extended the statute of limitations for sixty days or until May 15, 1925, under the provisions of *Section 277 of the Revenue Act of 1924 (26 U. S. C. A., Sec. 1057 and Note)*. The tax was assessed April 3, 1925. The plaintiff legatee of $300,00 under the will, paid the tax and brought suit to recover it on the ground that it was assessed after the statute of limitations had run. The case turned upon the sufficiency of the notice to extend the statute. If it extended the statute, the assessment was in time, otherwise it was not. The notice was addressed as follows:

"George H. Marsh, Deceased,
L. C. Morgan, Executor,
Van Wert, Ohio".

When the notice was sent the executor had been discharged and the estate administered as in the case now at bar. The Circuit Court of Appeals for the Sixth Circuit affirmed the District Court and held that the notice was insufficient to extend the statute of limitations.

In the case at bar the notice was addressed as follows (R. 15):

"Estate of Charles H. Hulburd,
c/o De Forest Hulburd,
86 East Randolph Street,
Chicago, Illinois."

This notice read in part as follows:

> "As provided by *Section 280 of the Revenue Act of 1926*, there is proposed for assessment against the estate the sum of $24,000.00, constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois. * * * "

At the time this notice was sent to the estate it was not in existence and De Forest Hulburd and the other executor had been discharged as was the case in *Nauts v. Clymer.*

The case of *Nauts v. Clymer* has been cited in such a way as to indicate concurrence therein by the Circuit Court of Appeals for the Second Circuit in *Lieberman's Committee v. Commissioner, 54 F. (2d)* at page *530.*

In the opinion of the Board of Tax Appeals holding against petitioner on the issue of statute of limitations, the decision of the Circuit Court of Appeals for the Sixth Circuit in *Nauts v. Clymer* is "distinguished" by the following *ipse dixit* of the Board:

> "While indicating the deficiency notice mailed appeared insufficient, having been addressed to only one of the three executors who had distributed the estate and been discharged, the Court rather emphasized the fact that the limitation expired before the assessment of April 3, 1925."

This overlooks the point that *the limitation would not have expired before the assessment of April 3, 1925, if the notice had been sufficient* and that in order to conclude that the limitation had expired before the assessment of April 3, 1925, it was necessary for the Court to squarely hold that the notice of deficeincy was insufficient to extend the statute of limifations because of the

discharge of the executor and settlement of the estate prior to its mailing and the Court did so hold.

Obviously the case of *Nauts v. Clymer* cannot be distinguished from the case at bar unless the fact that here the discharged executor appealed to the Board of Tax Appeals (and in the very petition on appeal pleaded his discharge and annexed thereto a certified copy of it (R. 5-9)), put him in a worse position than if he had paid the tax and then sued to recover it, as was done in *Nauts v. Clymer.* Such a construction of the statute "is not consistent with the great remedial purposes of the legislation creating the Board of Tax Appeals" (quoted from *Helvering v. Taylor, 293 U. S. 507, 516),* which was that one might have an opportunity to litigate a question before paying the tax in the same way that hitherto he could litigate it after paying the tax. These executors did not mislead or deceive the Commissioner because they pleaded their discharge, the distribution of the estate and set up the statute of limitations in the petition on appeal filed with the Board of Tax Appeals (R. 6). The effect of the Court of Appeals' decision on this point is to put them in a worse position because they appealed, than they would have been in had they not appealed.

In *Haag v. Commissioner, 59 F. (2d) 516, 517,* an executrix who had been discharged wrote a letter requesting assessment of tax within one year from the date thereof. The assessment was not made within the period requested and if the letter was effective the assessment was outlawed. The Court (opinion by the same Judge who wrote the opinion in the case at bar) held in *59 F. (2d) 516,* at page *517,* that the executrix having been discharged had no authority or right to write the letter. Hence it was

ineffective. That this holding cannot be reasonably reconciled with the one at bar that the former executors had authority to file the appeal with the Board is apparently recognized on page 11 of the Government's answer to the petition for the writ.

To say that an agent who has ceased to be an agent or an officer of the Court who has ceased to be an officer of the Court can make his acts, done after his authority has ceased, good as such agent or officer and confer authority upon himself by "waiver" of his own manufacture, is without support both in authority and in reason. To hold that one who appeals to the Board of Tax Appeals thereby waives the right to press one of the grounds urged in his appeal is utterly inconsistent with the spirit and purpose of the legislation creating that Board.

CONCLUSION.

On the merits the estate was not liable for the debt of the Van Sicklen Company because it received none of the property equitably answerable for that company's debt. The Trust Fund Doctrine is allied to the equitable doctrine of unjust enrichment and only an estate which has been unjustly enriched by receipt of a debtor's property is equitably answerable to respond to the extent of the property received.

When the appeal was filed the estate was not in existence and the executors were not such and had no right to file the appeal and it should have been dismissed for want of jurisdiction. *Lieberman's Committee v. Commissioner, 54 F. (2d) 527, 530 (C. C. A., 2nd).*

The question of the liability of the legatee was not raised before the Board of Tax Appeals and was not

raised in the notice of deficiency and should not have been considered by the Court. On the merits the legatee was not liable because he received none of the property of the Van Sicklen Company.

There is no authority in the *Revenue Act of 1926* for proceeding against estates defunct at the time of its enactment.

Furthermore, except in the case of an alleged liability under *Section 3467 of the Revised Statutes*, no authority can be spelled out of the words of *Section 280** for proceeding thereunder against anyone unless he is "a transferee of property of a taxpayer." If a person proceeded against is not a "transferee of property of a taxpayer" authority is lacking in the statute to proceed before the Board of Tax Appeals. This is clearly pointed out in *Whitney, 26 B. T. A. 212, 217*, in which the Commissioner has published his acquiescence in C. B. XIII-2 at page 19. Neither the executors nor the legatees in the case at bar were transferees of property of the taxpayer. If there is any authority in the words of *Section 280* for proceeding against them we emphatically challenge the respondent to point out the words of that section from which such authority may be spelled out. Indeed, the only authority contained in said section for proceeding against executors who are not transferees of property of a taxpayer is in case of liability under *Section 3467 of the Revised Statutes*, which claim was expressly abandoned in the case at bar along with any other possible claim under *section 3467*.

---

* The statute quoted on page 19 is not retroactive as pointed out on pages 21 and 22 hereof. It does not authorize proceedings against executors discharged before its enactment.

Where the executor has been discharged and a debt due the government is not paid there is still no authority for proceeding against the legally discharged executors as such,* but they are personally liable if before discharge they had notice of the government's claim under *Section 3467 R. S.* That is the statute designed to cover such situation. There is no liability under that section in this case because the executor before his discharge had no notice of the government's claim.**

As pointed out in the petition for the writ, the order of the Probate Court discharging the executors is not subject to collateral attack. The law of Illinois must be read as a whole and under that law estates cannot be re-opened and claims made therein which are not presented within one year after the granting of letters of administration except as to the univentoried portion of an estate and it is not claimed that any of decedent's estate was not inventoried. *(People v. Small, 319 Ill. 437, 447.)*

For the foregoing reasons the decision of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the decision of the United States Board of Tax Appeals should be affirmed.

All of which is respectfully submitted.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois.
Counsel for Petitioner.

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* Assuming the section quoted on page 19 is not retroactive and does not apply to executors discharged prior to its enactment.

** Besides liability under this Section assumes an enforceable claim against an estate, which for the foregoing reasons does not exist here.

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IN THE

Supreme Court of the United States

October Term, 1935.

No. 339

DE FOREST HULBURD,

Petitioner.

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
Counsel For Petitioner,
First National Bank Bldg.,
Chicago, Illinois.

U. S. Law Printing Company, 2847 N. Halsted St., Chicago, Ill.

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REPLY BRIEF FOR PETITIONER.

May It Please The Court:

On page 36 of our main brief we emphatically challenged the respondent to point out any words in the law giving the Government the right to a remedy against an executor before the United States Board of Tax Appeals other than *Section 281(b) of the Revenue Act of 1926,* quoted at page 19 of our brief, and at pages 18 to 20 of our brief we discussed this point in detail. We pointed out, at page 21 of our brief, that petitioner had been discharged one year before the enactment of this

section and urged that its words were entirely prospective. For example, it refers to a person who "*is acting* in a fiduciary capacity for a person subject to the liability specified in *Section 280*" and it uses the future tense by saying: "The fiduciary *shall assume,* on behalf of such person," etc.

We pointed out that the Circuit Court of Appeals for the Second Circuit in *Liberman's Committee v. Commissioner, 54 F. (2d) 527, at page 529,* had squarely held that this statute was prospective in effect and was not retroactive. On page 19 of our brief we stated that if we were correct in this contention it was unnecessary for the Court to proceed further before holding that the Act did not contain any authority for the enforcement of a remedy before the Board of Tax Appeals against executors who were not such at the time of its enactment. An examination of respondent's brief does not disclose any answer to this contention.*

The rule against construing ordinary legislation to be retroactive was thus stated by this Court in *Union Pacific R. R. Co. v. Laramie Stock Yards Co., 237 U. S. 190, at page 199:*

> "Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts

* On page 17 of respondent's brief it is said that the Commissioner had at least constructive notice of the discharge "and here he did not". These executors pleaded their discharge in their petition filed with the Board of Tax Appeals (R. 7) and even annexed a copy of their discharge to that petition. The record shows a copy of this petition was served on the Commissioner and he answered it. Although this put him on notice he took no steps to proceed against anyone else. If he has lost any tax, it is wholly due to his own negligence, but as demonstrated in this brief he could not have recovered on the merits even if he had proceeded in time.

> or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength, but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' *United States v. Heth, 3 Cranch 413, 2 L. Ed. 483; Reynolds v. M'Arthur, 2 Pet. 417, 7 L. Ed. 470; United States v. American Sugar Ref. Co., 202 U. S. 563, 577, 50 L. Ed. 1149, 1152, 26 Sup. Ct. Rep. 717; Winfree v. Northern P. R. Co., 227 U. S. 296, 57 L. Ed. 518, 33 Sup. Ct. Rep. 273.*"

It cannot be said that "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature" make this statute retroactive. While the above is the rule which obtains in the construction of ordinary legislation, yet to tax laws, because all doubts are to be resolved in favor of the taxpayer *(Gould v. Gould, 245 U. S. 151)*, it applies with peculiar force. *Schwab v. Doyle, 258 U. S. 529, 534, 535; Brewster v. Gage, 280 U. S. 327, 337; United States v. Magnolia Petroleum Co., 276 U. S. 160, 162.*

In the case of *Phillips v. Commissioner, 283 U. S. 589*, the executor was acting as such at the time he appealed to the Board of Tax Appeals and at the time of the proceeding in this Court. There was no question of the effect of discharge in that case. Hence the question which arises here was not there present.

Furthermore, it has been properly and consistently held by the Board of Tax Appeals that *Section 280* of the statute here relied upon should be strictly construed

against the respondent. In *E. J. Wray, 24 B. T. A. 94, at page 96,* the Board of Tax Appeals said:

> "As we said in *Continental Oil Co., 23 B. T. A. 311:*
>
> The provisions of *section 280* constitute an extraordinary method of collecting the taxes of the person who is primarily liable therefor, and consequently they must be construed strictly against the respondent."

The force is apparent of the following observation in *C. A. Hutton, 21 B. T. A. 101, at page 105:*

> "The laws governing the liability of a transferee are not new. They have been administered in the courts for ages. The essence of such laws is that they give to creditors the right, either in law or in equity, to hold a third person liable for the debts of someone else. The courts have always been strict in applying such a law. To hold one person liable for the debt of another is a rather hard rule."

To construe this section to be retroactive it is necessary to reach the illogical conclusion that it imposed duties upon executors who had ceased to be such a year before it came into existence.

Inasmuch as it does not authorize this proceeding respondent must fail.

PETITIONER IS NOT LIABLE ON THE MERITS EITHER AS EXECUTOR OR AS LEGATEE BECAUSE HE DID NOT RECEIVE ANY OF THE PROPERTY OF THE TAXPAYER.

Although respondent takes this point up last in his brief (apparently putting what he considers his better foot forward first), we reply to it here because it goes to the heart of the case.

On page 27 of respondent's brief, the heading under Point IV is, "Petitioner Is Liable As One Who Holds Property of A Corporation Which Dissolved Owing Unpaid Taxes," but petitioner does not hold any property of the corporation and it was not proved that he did. Hence respondent's premise fails. On page 7 of his brief respondent states that summarizing his argument:

> "Petitioner received funds from the decedent which in turn had been received as a dividend on dissolution of a corporation owing unpaid taxes. These moneys were impressed with a trust in favor of the Government. To the extent that the aggregate of the intermingled fund consisting of the trust funds and those of the decedent or legatee remained intact, the trust funds can be traced."

It was not proved that petitioner received funds which the decedent had received from the corporation. It was not proved that there was any intermingled fund or that any such fund remained intact. For ought that appears the decedent in the years between the receipt of this money and his death may have spent all his money or even overdrawn at the bank and borrowed more money to replace it and later accumulated money to repay the loan and constitute the cash in his estate.

In the last paragraph on page 27 of his brief, respondent states:

> "This liability is often expressed in terms of a trust fund, but the relationship is in reality that of the debtor to his creditor."

No authority is cited for the proposition that the relation is that of debtor and creditor and no such authority can be cited. Because any liability must depend solely on the trust fund doctrine and because none of the fund

was traced into the estate of Hulburd, the respondent could not have recovered without tracing such fund into the estate even if he had filed a claim against the estate during the time it was in existence and petitioner was acting as executor. That this liability depends solely on the trust fund doctrine appears from the cases cited on page 27 of the respondent's brief, which put the liability upon that ground. It appears also from the Report of the Committee of Congress quoted on page 15 of petitioner's main brief, which so stated, and it further appears from the ruling of the Treasury Department quoted at pages 16 and 17 of petitioner's main brief.

At common law, one was not liable for the debt of another unless he had contracted to pay it. There being no liability of decedent at common law, equity jurisprudence must be examined to ascertain if one exists. The courts of equity have not gone so far as to hold that one person is liable for the debt of another in the absence of his contract to pay it. What courts of equity have held by means of the trust fund doctrine is that the debtor may follow the property of the creditor and lay hands on it if found in possession of someone to whom it has been conveyed without consideration. That is the extent of the doctrine. It is somewhat in the nature of an equitable lien and as such is inseparable from the fund to which it attaches.

Cases dealing with the liability of bank stockholders are not in point because there the liability does not depend upon and has no relation to the trust fund doctrine, but is a liability created entirely by statute. *(Forrest v. Jack, 294 U. S. 158.)* In the case at bar respondent concedes, on page 18 of his brief, that the statute herein

involved creates no liability. The liability sought to be enforced here is the old and well known one and depends entirely upon the trust fund doctrine.*

As stated in *Fletcher on Corporations (1933), Sec. 8161,* the creditor tracing trust property must take the property as he finds it. If it has depreciated in value and the depreciation is due to no negligence of the holder, he must take it in its depreciated form. If it has appreciated in value, he is entitled to the benefit of the appreciation.

In the case at bar, the statute quoted on page 12 of our main brief plainly put the burden of proof on the respondent in this proceeding before the Board, not merely to show that the petitioner was a transferee of property of a taxpayer (which he did not show) but placed upon him the heavier burden of showing "that *petitioner is liable* as a transferee of property of a taxpayer." (Italics ours.)

Respondent utterly failed to show that the petitioner was even a transferee of property of a taxpayer. A case squarely in point is *United States v. Myers,* to which the respondent has called the Court's attention at our request, on page 32 of his brief. This case is published in the *Commerce Clearing House Tax Service for 1935* at

* The trust fund doctrine has been criticized by writers and courts on the ground that it has been applied to situations which could have been decided without it. For example, when the capital stock of a corporation has not been paid in full it has been said that the liability in such case could have been put upon the ground of a false representation or fraud and that it was unnecessary to invoke the trust fund doctrine. (Hospes v. N. W. Mfg. Co., 48 Minn. 174.) Where its assets have been distributed by a corporation after it has actual knowledge of the creditor's claim, it has been said that the liability might be put on the ground of a fraudulent conveyance rather than on the ground of the trust fund doctrine. But these criticisms do not fit a case where a corporation innocently distributes its assets without any knowledge of a creditor's claim.

paragraph 9592. In that case the United States sued the Administrators of the Estate of F. E. Myers, deceased. As in the case at bar it merely proved that F. E. Myers during his lifetime had received property of a taxpayer, and rested. The Court properly held this proof entirely insufficient to establish a case, saying:

> "Upon due consideration of the facts stipulated, I think that the equitable relief prayed for by the plaintiff should be denied. This is not a suit to enforce, or recover on, a personal tax liability; it is one to reach the remaining assets of a delinquent and dissolved corporate taxpayer, if any such assets may be found in the hands or control of the administrator of one of the stockholders of the taxpayer who had received his distributive portion at dissolution ten years before the suit was commenced. There is no evidence that any part of the corporate assets are presently possessed by the estate of F. E. Myers, deceased. No attempt at evasion of the tax is asserted and the agreed facts indicate that the responsible agents of the plaintiff knew of the dissolution of the corporate taxpayer approximately eight years before suit was commenced. No assessment of any portion of the corporation's delinquent taxes was ever made against the decedent stockholder.
>
> Judgment may be entered for the defendant and special findings as requested by the defendant will be approved and adopted."

The Government attempts to distinguish this case on page 33 of its brief by saying that in that case the burden of proof rested on the Government, whereas "here the burden seems properly to rest upon petitioner." That is a misapprehension for as we have said the statute quoted on page 12 of our main brief places the burden squarely upon the respondent in these proceedings before the Board of Tax Appeals. He must prove exactly the same things he would have to prove in a suit in court.

In the case of *Annie Temoyan, 16 B. T. A. 923,* the Board of Tax Appeals took this view and held that proof that the decedent during his lifetime had received assets of a taxpayer fell far short of meeting the burden of proof imposed upon the respondent by the statute, quoted at page 12 of our main brief. In that case the petitioners as trustees, held property of the decedent but it was not proved that any of the taxpayer's property was included in the property held by them. The Board said at page *925:*

> "If the funds of the company could be traced through the estate of John Temoyan and a part into the hands of Hormig Temoyan, what part of such funds did the petitioners receive?
>
> It is evident that the statute places a real burden on the Commissioner. He must establish the liability of the transferee against whom he proposes to proceed. He must establish all facts necessary to show that there is a liability at law or in equity on the part of that transferee for the payment of the whole or a part of the liability. This burden is not met by such an indifferent showing of the facts as we have here."

We know of no case where an estate of a deceased transferee has been held liable for the debts of a corporation unless it was proved that it received property of the corporation, except the case at bar in which the Circuit Court of Appeals expressly stated in the quotation from its opinion on page 14 of our main brief that there was no liability on any Trust Fund theory, but assumed that one was "created and defined by the statute." The respondent forced to admit that none is created and defined by the statute, is compelled on page 18 of his brief to argue that the language of the Court below "may not be particularly apt" and that the Court did not mean what it thereby said.

On page 30 of respondent's brief it is said that equity presumes "the money of the rightful owner is the last to be withdrawn from the intermingled fund." There is no basis here to apply this rule because it was not proved that there was any intermingled fund, or if there was one that it remained intact and was not completely expended by decedent before he died, or transferred by him without consideration to another person during his lifetime. This situation brings the case squarely within the scope of the quotation from the decision of this Court on page 30 of our main brief. On page 30 of its brief respondent attempts to distinguish this case relied upon by us by saying:

> "There the claimant was unable to trace his money into any specific fund and he failed to show that any specific fund, as opposed to the aggregate of all the separate deposits, remained intact throughout the twelve years after the wrongful taking. Since the burden was on him, he was properly held not to have succeeded in tracing his money so as to impress it with a trust."

The situation is precisely the same here. The respondent has failed to trace his money into any specific fund and to show that any specific fund remained intact after the receipt of the liquidating dividend by the deceased. (It would do violence to the facts to say that decedent was guilty of any wrongful taking.)

As stated by this Court in the case quoted from on page 30 of our main brief, even in cases where the exaction is illegal the trust fund doctrine, to use the words of this Court,

> "does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks."

Respondent seems to contend that it does.

There being no proof in this case that the executor received any of the trust property, recovery could not have been had against him even had a claim been presented by the respondent during the time he was executor. The legatee being one step farther removed from the decedent than the executor, no recovery may be had against him for the reason that it not appearing the executor received any of the taxpayer corporation's property, it does not appear that the legatee, whose distribution came from the executor, received any.

Thus on the merits of the case respondent must fail.

THE DISCHARGE OF THE EXECUTORS PREVENTS THE MAINTENANCE OF A PROCEEDING AGAINST THEM AS EXECUTORS.

On page 10 of its brief respondent states:

> "Whether or not the executor is liable for taxes assessed after his discharge is a matter of congressional intent."

No statute is cited or quoted (other than the one previously referred to and which we say has no application here because it is not retroactive) which imposes any liability on these executors. It is conceded in the respondent's brief that *Section 280* does not impose any liability and that the reference in the opinion of the Circuit Court of Appeals to the liability "created and defined by the statute" cannot be defended. On page 9 of its brief the Government states:

> "Petitioner contends, in short, that the discharge of the executors and distribution of the estate barred the Government from asserting any claim against the executors in their representative capacity. *It is submitted that this circumstance cannot bar the United States from the collection of taxes to which it is entitled.*" (Italics ours.)

We have put the second sentence of the Government's statement in italics because it has no necessary relation to the first sentence of the statement. It illustrates a fundamental fallacy in the Government's argument, which assumes that in contending that the discharge of the executors and the distribution of the estate prevents an action against them as executors, we are thereby contending that it operates as a general statute of limitations and destroys the right of the Government to collect its taxes. (See pages 15 and 16 of Government's brief.) To maintain our argument that after their discharge the executors could not be sued as such we could assume, without conceding, that it did not operate as a statute of limitations and did not bar whatever remedy the Government might have against the legatees or distributees. To put it another way, our contention is that the discharge of the executors and the distribution of the estate destroys the right to subsequently bring an action against them as executors just as the death of a natural person destroys the right to subsequently maintain an action against him. The conclusion that it does, does not involve the conclusion that the right of the creditor to recover is barred, nor the statute of limitations. The right may not be barred for the reason that the creditor may have the right to maintain an action against some existing person, such as a legatee, for the enforcement of his right. Neither the death of a natural person nor the extinction of an estate have any effect on the statute of limitations but do prevent an action against the extinct entity.

In *Forrest v. Jack, 294 U. S. 158,* this Court said, at *page 163:*

> "In the absence of federal enactments relating to procedure for enforcement of the liability imposed

by §66, collection is to be made in accordance with state laws governing claims against estates of deceased persons at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority. There is no suggestion that the laws of the State of Utah discriminate against or are inadequate for the just and convenient enforcement of liability imposed, §66, against estates of deceased stockholders. There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate.

In this case, the Comptroller's assessment was made more than eleven years after complete distribution and long after decedent's widow as distributee became the actual, though not the registered, owner of the stock and liable under §64. The decree of March 11, 1920, closed the estate. The fact that the administrator was not formally discharged until December 1, 1931, about the time the bank failed, is without significance here as the Comptroller's assessment was not made until March 8, 1932. As the estate had ceased to exist before the bank became insolvent, the Circuit Court of Appeals rightly held that petitioner as administrator was not required by Utah law *(Rev. Stat. 1933 §102-9-26)* to retain or pay into court any property or money to cover possible future liability in respect of the stock that had been decreed and distributed to the widow. There is nothing to support the allegation of *devastavit.*"

Apparently the reason *Section 3467 of the Revised Statutes* (discussed at pages 22 to 24 of our main brief) was enacted was to make an executor personally liable if he distributed the assets of an estate after having notice of the Government's claim. A holding in accordance with the argument of the Government that it may sue an executor after distribution of the assets of the estate and after his discharge in effect assumes that *Section*

3467 was superfluous and that an executor who is not liable under the decisions referred to at pages 23 and 24 of our main brief construing *Section 3467*, is nevertheless liable without it.

To say that an executor of an estate which has been extinguished by decree of Court may be subsequently sued as executor is analogous to saying that a dead person may be sued after his death.

The case of *Evans, 12 B. T. A. 334*, relied upon on page 16 of the Government's brief, proceeds upon the same mistake which the Government makes here, viz.: that the contention that a discharged executor may not be sued is the same contention as the statute of limitations whereas in reality the statute of limitations is no more involved in this contention than it is in the contention that a dead man may not be sued after his death. So far as the *Evans case* puts the liability upon *Section 3467 R. S. (p. 338)* it may be sound for it may be that in that case the executor had notice of the Government's claim while acting as such. The *Kaufman case, 15 B. T. A. 141*, merely cites and follows the *Evans case* and in that case the point apparently was not raised in the Circuit Court of Appeals. Both of these cases are distinguished by the Board of Tax Appeals in its opinion in the case at bar (Rec. 78).

RESPONDENT HAS MISAPPREHENDED THE ILLINOIS LAW.

As we understand the argument of the respondent, it is to the effect that under the Illinois law he could have recovered for this claim against the executors. There could have been no recovery for this claim under the provisions of the Illinois law. The Illinois law is that claims not

presented within one year from the issuance of letters are forever barred, with two exceptions not material here. One of these exceptions is designed to cover such assets as may subsequently turn up and claims presented after one year are not barred, but are only payable out of the uninventoried portion of an estate. (It is not suggested that there was any such property in the case at bar.) The other claim which is not barred is a contingent claim which does not accrue in time to present it within one year. It is this character of claim which is discussed in the quotation from the Illinois case on page 13 of respondent's brief as appears from the quotation itself. In the case of such contingent claim, however action may not be maintained against the executor but must be maintained against the person to whom the property has been distributed. For example, in *Mortimer v. Potter, 213 Ill. 178,* Potter held the property as Trustee and had received notice of the Government's claim during the time he held it.

The Illinois law as it now exists, is clearly stated in the case of *Sanders v. Merchants State Bank, 349 Ill. 547.* In this case the first opinion was withdrawn and the opinion is the one rendered on rehearing. Due to the division in the Court the case was carefully considered and it has not been modified in any way. At pages *564, 565. 566* and *567,* it is said:

> "The case of Martha Barron is different from that of any other appellant. It is not based on her liability as a stockholder, for she was never the owner of any stock in the bank. Her husband, Robert Barron, was the owner of twenty shares from the time the bank was organized, in May, 1900, and became the owner of twenty additional shares on February 19, 1914. He continued to own the forty shares until January 28, 1925, when he transferred them, nearly six years be-

fore the bank failed. About two and a half years later, on September 3, 1927, he died, leaving a will by which he gave all his property to Martha, his widow, and she received under the will personal property of the value of $5500 and real estate of the value of $11,000. His will was admitted to probate and record on October 5, 1927, and the estate was finally settled and the executrix discharged on October 23, 1928, over two years before the failure of the bank. The theory on which the decree against Mrs. Barron was predicated is, that in addition to his investment in the stock of the bank, which, of course, was liable for all the bank's debts, her husband was personally and individually liable, to the extent of his stock, for every debt of the bank which accrued during the time he owned the stock, that this liability was in no way affected by the transfer of his stock, but continued to the extent mentioned, until every debt which had so accrued was paid, and that upon his death leaving any such debt unpaid it further continued to be a liability against his estate to the amount of the stock he owned. Assuming all this to be true, any depositor of the bank during his ownership of the stock having made a demand of payment might have sued him for the amount of his deposit under the constitutional imposition of liability on him, and any other creditor whose claim accrued during his ownership of the stock, and was due, might have sued him without any demand. So if, after Barron's death, a creditor of the bank had exhibited a claim against his estate within one year after the date of the letters testamentary issued to his executrix there would have been no valid defense to the extent of Barron's stock. However, the *sixth clause of section 70 of the Administration Act* provides that all demands not exhibited to the court within one year from the granting of administration shall be forever barred unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate. This provision

creating a limitation upon the time for filing claims against an estate is not a general statute of limitations. The purpose of the act in regard to the administration of estates was to facilitate their early settlement, and the limitation for the exhibition of claims to two years (a time afterward reduced to one year) had that particular purpose in view. A claim not exhibited within the time fixed is not absolutely barred but its right to participate in the distribution of the assets of the estate actually inventoried or accounted for is lost. *(Waughop v. Bartlett, 165 Ill. 124; Gross v. Estate of Thornton, 286 id. 185; Durflinger v. Arnold, 329 id. 93.)* The rule is applied in equity as well as at law, and while a mortgagor may foreclose his mortgage in equity after two years without presenting to the administrator or the court the note or other obligation secured by it, he cannot have a deficiency decree for participation in the assets of the estate which have been inventoried or accounted for. *(Mulvey v. Johnson, 90 Ill. 457; Kittredge v. Nicholes, 162 id. 410; Waughop v. Bartlett, supra.)* Therefore, if the creditors of the bank had such a claim against Barron as could have been presented and allowed against his estate, the failure to present it within the time fixed by the statute is a bar to a recovery by any other proceeding. It was held in *Ryan v. Jones, 16 Ill. 1,* that the personal estate of a decedent is primarily liable for the payment of his debts and must be exhausted before resort can be had to the real estate. 'Demands against the estate of a deceased person must be exhibited within two years from the grant of administration. A creditor free from disability who fails to present his claim within that time is not allowed to participate in the proceeds of the personal estate previously inventoried or accounted for by the executor or administrator. He must satisfy his debt out of property subsequently discovered or inventoried.'

The defense as to the claim against Mrs. Barron rests entirely upon *Section 70 of the Administration Act* and the failure to exhibit the claim against the

estate of her husband within a year from the date of issue of letters testamentary. The appellees' answer to this defense is that the creditors were unable to exhibit their claims during the administration of the estate because during the whole time of one year after the issue of letters testamentary they were mere contingent liabilities and not obligations of the estate, and therefore could not be allowed or considered in the settlement of the estate. In *Union Trust Co. v. Shoemaker, 258 Ill. 564,* and in *Chicago Title and Trust Co. v. Fine Arts Building, 288 id. 142,* it was held that the limitation of *Section 70* did not apply to actions against heirs, devisees or legatees to subject property of the estate received by them to the payment of contingent liabilities of the estate. The claim which was held in the first of these cases to be a mere contingent liability and not a fixed obligation of the estate was upon a replevin bond executed by Walter Shoemaker, a partner in the firm which was plaintiff in the replevin suit, to the sheriff having the writ with the conditions usual in such bonds. The property was taken by the sheriff by virtue of the writ and delivered to the plaintiffs. Fifteen years later the case was tried and resulted in a judgment in accordance with the law of Michigan, where the case was pending, for $39,341.45. In the meantime, Shoemaker, who lived in Chicago, died testate in 1900, his will was admitted to probate and letters testamentary were issued, his executor and executrix settled his estate, filed their final account and were discharged September 28, 1904, and the estate was distributed. A little over two years later a bill in equity was filed against the executor and executrix of the will, who were the residuary devisees and had each received more than enough of the assets of the estate to pay the amount sought to be recovered. Shoemaker having died before judgment, of course no judgment was or could be rendered in the replevin suit against him or his estate. There was no breach of the bond until judgment was rendered, and before that occurred the liability was entirely contingent.

There was a potential liability on the bond but no actual liability until the breach by failing to prosecute the suit with effect. Until that time there was no liability, present or future, to pay, and, of course, none for which any claim could be exhibited or prosecuted. The liability was dependent on an event which neither party could control and was therefore contingent. In the other of the cases cited the claim was for installments of rent upon a lease to the deceased for a term of ten years at a rent of $2166.67 a month. The lease was assigned with the consent of the lessor, the assignee assuming the liability of the lessee. The assignee died in the fifth year of the term and the lessor exhibited against his estate a claim for the installments of rent for the remainder of the term, but it was held that the claim was contingent because there were contained in the lease contingencies, the happening of which was not within the control of either party, which might defeat all right to recover rents; as, for instance, a provision that in case of such damage by fire as to render the building untenantable a failure to repair in thirty days should entitle the lessee as well as the lessor to terminate the lease, or a provision that in case the lessor desires to rebuild the buildings he may terminate the lease. In both these cases the claim was contingent because it was entirely uncertain whether there would ever be any liability.

It is said that a creditor of the bank was prevented from exhibiting his claim against the estate of Robert Barron because it was not due until demand of payment was made of the bank and refused. The creditor was not so prevented from exhibiting his claim. He could have demanded payment of the bank at any time and payment would either have been made or refused. It was his own *laches* which prevented his obtaining the allowance of his claim against Barron's estate. There was no obstacle, except his own will, in the way of his making a demand on the bank. He chose not to exhibit his claim or make de-

> mand for its payment. If it was necessary for him to make a demand and he failed to make it, the absence of a demand might be a defense to his claim; but he could not allege his refusal to make a demand during the whole period of a year from the date of the letters testamentary to bar the defense of *Section 70 of the Administration Act*, by showing that he was prevented from exhibiting his claim by reason of the fact that it was contingent and that he had refused to remove the contingency by making a demand at the bank. It would be most inequitable to permit creditors who could with a breath remove the supposed obstacle to the prosecution of their claims, to remain inactive, to refuse even to demand payment of the bank, and by their neglect to pass on a liability to future generations."

No Illinois case holds that except as to a contingent claim there may be recovery on any claim not presented within one year from the issuance of letters except against property not inventoried. (No such property existed in the case at bar.)

The Illinois cases cited on page 12 of the respondent's brief do not touch the point. In the case at bar the estate was fully settled. A claimant cannot bring in a claim years afterwards and claim that the estate has not been fully settled because his claim was not presented and allowed. *Starr v. Willoughby, 218 Ill. 485,* was a case where a will gave an executor power to sell real estate. In holding that he had power to make the sale after his discharge the Court said, at pages *491* and *492:*

> "When an executor resigns or is removed, his power as Trustee, which devolves upon him by virtue of his executorship only and not by express appointment as Trustee to sell real estate, is revoked."

If the power to sell the real estate had not been expressly given in the will, the executor could not have made the sale, as the above quotation states because his power as executor was revoked.

The case of *Maguire v. City of Macomb, 293 Ill. 441*, was a case which involved the question of the right of an executrix to file and maintain a bill to remove a cloud on title after her discharge. The Court held that the will not only appointed the executrix as such but also appointed her a Trustee. (See page *452.)* It then held that she had a right to maintain the bill as Trustee:

> "Defendant in error is executrix and Trustee under the will, and it is immaterial that the decree orders her to proceed as executrix although in the bill she is described as Trustee merely." (p. *453.*)

The respondent's attempted distinction of *Lindley v. United States, 59 F. (2d) 336 (C. C. A. 9th)*, at page 17 of its brief, must fail because under the Illinois law if the estate is closed without payment of a debt not presented within one year, the creditor has no remedy except in the case of contingent claims* and except as to uninventoried property which two exceptions do not obtain here. We do not extend this brief by quoting from this case on the alleged liability of a discharged executor, and instead of quoting it, ask your Honors to read it at this point.

At the bottom of page 28 and top of page 29 of his brief the respondent discusses *subdivision (f) of Section 280*, which reads:

> "As used in this section, the term 'transferee' includes heir, legatee, devisee and distributee".

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* This tax was not a contingent claim. Hutton v. Commissioner, 59 F. (2d) 66, 69 (C. C. A. 9th); Uncasville Mfg. Co. v. Commissioner, 55 F. (2d) 893, 895 (C. C. A. 2nd).

Obviously reference must be had to the term "transferee" as previously used in *Section 280* in order to determine its meaning. The previous use of this word in the section is as follows:

> "The liability, at law or in equity, of a transferee *of property of a taxpayer*". (Italics ours.)

Manifestly a legatee may not be proceeded against under this section unless he is a transferee "of property of a taxpayer". This is fully demonstrated at pages 15 to 17 of our main brief. The decedent in the case at bar was not the taxpayer, but the Van Sicklen Company was the taxpayer. This is not a proceeding to collect a tax liability but rather a proceeding to follow trust funds, as fully shown on pages 15 to 17 of our main brief.

There is one more point which ought to be mentioned here. At the top of page 5 of its brief, respondent claims not only the $8,000 received by decedent, but this sum "plus 6% interest from February 26, 1926". It is not claimed that the decedent received more than $8,000. He was guilty of no wrongdoing. There is no showing that he used this $8,000 for his own profit. Hence, there appears no basis for a claim for interest. In *Pierce v. United States, 255 U. S. 398,* at page *406,* the Court reversed a decree which allowed interest and the observations therein seem pertinent here.

THE CIRCUIT COURT OF APPEALS SHOULD NOT HAVE CONSIDERED THE QUESTION OF PETITIONER'S LIABILITY AS A LEGATEE AND HELD THAT HE WAS LIABLE AS SUCH.

On page 31 of its brief the respondent criticizes the petitioner for failure to produce evidence to rebut facts which respondent claims proved *prima facie* that petitioner was liable as a legatee.

The burden of making a case before the Board of Tax Appeals was on the respondent and he did not proceed against petitioner as a legatee before the Board of Tax Appeals. This the Circuit Court of Appeals clearly stated in the extract from its opinion quoted at the bottom of page 27 of our main brief. Petitioner was proceeded against solely as an executor and because he considered that he was not liable as executor and that being the only basis of the proceeding before the Board, manifestly petitioner, who did not have the burden of proof placed upon him by the statute, did not go to the trouble of producing evidence to show that he was not liable as a legatee when it was not claimed that he was. If such evidence existed, it is manifest that it would be unfair for the Circuit Court of Appeals to consider and finally decide a ground of liability not asserted before the Board of Tax Appeals for the reason that petitioner had no occasion to meet it. Even if all respondent had to do to make a *prima facie* case against a legatee was not to prove that the legatee received any property of the taxpayer but that a decedent at some time received property of the taxpayer, then if a legatee could prove, for example, that the decedent invested the specific property in a municipal bond (a legal investment for trust funds) and that the bond had defaulted and shrunk to nothing, he would be exonerated or if he could prove that the property of the taxpayer corporation sought to be pursued was not transferred to him but to some other legatee he would not be liable. He might also prove that the deceased transferee during his lifetime innocently transferred the trust property to A without consideration, in which case A would be the proper person for the respondent to proceed against. There are other things which might be proved in defense of the alleged *prima facie* case, but manifestly a legatee

against whom no claim is asserted, knowing that the respondent has the burden of proof, will not go to the trouble of rebutting a claim which there is no attempt to make against him.

If the Circuit Court of Appeals ever has the right to hold a taxpayer liable on a ground not presented to the Board of Tax Appeals and which he had no occasion to meet, it is only where the facts and circumstances clearly manifest that there would be no possibility of a defense.

While as indicated in our brief and in respondent's brief, the cases are in conflict on the right of the Circuit Courts of Appeal to consider a question not raised before the Board of Tax Appeals, it seems to us that the true rule is that under the statute the Circuit Court of Appeals has the right and power when such a question is raised, in its discretion, to remand the decision of the Board and direct the Board to consider the question not presented to it, but that this is the limit of its right. For it to proceed to consider and decide on the merits against a party a question not raised below and which there was no attempt to meet, and which might possibly have been met, is in effect to deprive a party of his day in court.

On pages 19 and 20 of its brief the respondent says that persons who petition the Board for redetermination "are estopped from questioning either the jurisdiction of the Board or the sufficiency of the notice".

So far as the jurisdiction of the Board is concerned it must be conferred by statute or it does not exist and the right to question it at any time is akin to the right to question the jurisdiction of the District Court of the United States. The matter of estoppel rests upon the

equitable principle that one who has made a representation and induced another to rely thereon cannot thereafter change the representation to the damage of the one relying thereon. An analysis of the cases cited by respondent on page 19 will generally show that a petitioner appealed to the Board and by concealment of a material point induced the Commissioner to do nothing until after the statute of limitations had run and then attempted to shift his position or take advantage of a point hitherto concealed. Such is not the case in the case at bar. The discharge of the executors was pleaded in the petition and a copy of it annexed thereto. The rule of estoppel is not a rule of thumb or a magic formula. Before it can be invoked the well known equitable reasons which underlie it must be present. The party relying upon it in tax cases has the burden of making it clearly appear. (*Helvering v. Brooklyn City R. Co., 72 F. (2d) 274 (C. C. A. 2d); Brewerton v. United States, 9 F. Supp. 503 (Ct. Cl.)*)

For the reasons stated on page 34 of our main brief, this Court should be cautious in holding that a petitioner loses rights by exercising the statutory remedy of appeal to the Board of Tax Appeals. As developed on page 34 of our main brief, to so hold would in some cases thwart the purpose of the legislation creating this Board.

The objection to the consideration by the Circuit Court of Appeals of the claim against the legatee is not based on the address of the letter alone but on the entire letter, from the address to the signature. Nowhere in this notice of deficiency is there a claim against a legatee. As pointed out on page 28 of our main brief, the claim against the legatee was first made in January, 1934, almost fourteen

years after the Van Sicklen Company became liable for the tax and ten years after Hulburd's death. The allowance of a claim made so belatedly has the effect of preventing its deduction in computing the estate tax due from an estate which was long ago paid and the refund of which is barred by limitation. Furthermore, as stated on page 23 of the respondent's brief, it cannot be told from the opinion of the Circuit Court of Appeals whether it intended to limit petitioner's liability to $4,000 or to hold him for $8,000.

For the foregoing reasons or any of them the decision of the Circuit Court of Appeals should be reversed and the decision of the Board of Tax Appeals affirmed.

All of which is respectfully submitted.

HENRY A. GARDNER,
ALFRED T. CARTON
JOHN E. HUGHES,
Counsel for Petitioner.
First National Bank Bldg.,
Chicago, Illinois.

FILE COPY

IN THE

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October Term, 1935.

No. 39

DE FOREST HULBURD,

Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Seventh Circuit.

SUPPLEMENT TO PETITIONER'S REPLY BRIEF.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Counsel for Petitioner.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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May It Please The Court:

The purpose of filing this supplement is to cite additional authority in support of the points made in our Reply Brief.

With reference to page 17 of the respondent's brief and the claim that "the executor has a continuing status as the representative of the decedent" under Illinois law, we cite the following statement in *Horner's Probate Practice (3rd Ed.), p. 575, Sec. 256:*

> "If an administrator makes a final settlement after due notice, and is discharged, he is not liable for debts that are afterwards discovered, even if such debts are entitled to share in the property accounted for and distributed; the creditors' remedy is against the distributee or legatee, if no refunding bond has been filed, or on such bond if one be taken, for the creditors' use under the above statute."*

From the above quotation it appears that after the discharge of a representative of a decedent even as to claims not barred by limitation, suit must be brought against the distributee or legatee or on a refunding bond if one be taken.**

In *Klicka v. Klicka, 105 Ill. App. 369,* at page *372,* the Court holds that no refunding bond may be required by a representative of a decedent except to protect him against claims presented within the time allowed by the *Administration Act* for presenting them. (Then two years, but reduced to one year before the period in controversy.)

FURTHER AUTHORITY ON THE RIGHT OF THE CIRCUIT COURT OF APPEALS TO CONSIDER THE QUESTION OF THE LIABILITY OF THE LEGATEE.

The first rule for appeals from the Board of Tax Appeals, which the Conference of Judges of the Circuit Court of Appeals adopted at the suggestion of the late Chief Justice Taft provides that the appeal petition:

> "shall contain assignments of error separately stated and numbered in respect of each and every error asserted and intended to be argued".

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* The 1935 edition of the Illinois Revised Statutes, published under the Auspices of the Illinois State Bar Association by Callaghan & Co., containing the Administration Act, is keyed in by the publishers to Horner's Probate Practice which is the leading Text Book on the Illinois law of estates.

** The executor here gave written notice to the respondent to present his claims (R. 27).

The assignment of errors contained in this record (R. 86) consists of three errors, none of which allege any error on the part of the Board in failing to decide that petitioner was liable as a legatee.

The rules which the Circuit Court of Appeals have adopted to govern other appeals provide that the Court may notice a plain error not assigned, but apparently this rule means that the point upon which the plain error appears must have been raised in the Court below. (Note *Wood v. A. Wilberts Sons Shingle & Lumber Company, et al., 226 U. S. 384,* at page *386.)*

It is settled that after the Board has handed down its decision, but before it has entered a final order on its records, a new point may not be raised under rule 50. *(Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308; 313;* see also *Fifth Avenue Bank of New York, 32 B. T. A. 701.)* Of what avail is this rule if a new point may afterwards be raised in the Circuit Court of Appeals?

COMMENT ON THE MERITS.

The case of *Knatchbull v. Hallett, L. R. 13 Ch. 696,* cited on page 30 of respondent's brief, contains this important statement at page *708:*

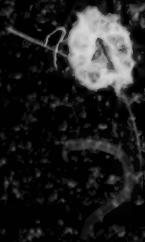
> "It is not disputed that the money remained at his bankers mixed with his own money at the time of his death; that is, he had not drawn out that money from his bankers."

Again it is said at page *731:*

> "It is further to be noted and it is to my mind a material circumstance, that the balance to the credit of the account never fell below the aggregate of the two sums of trust moneys."

All of which is respectfully submitted.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
Counsel for Petitioner.



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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 937

DE FOREST HULBURD, INDIVIDUALLY AND AS EXECUTOR OF AND TRUSTEE UNDER THE WILL OF CHARLES H. HULBURD, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The two opinions of the Board of Tax Appeals (R. 67–79) are reported in 21 B. T. A. 23 and 27 B. T. A. 1123. The opinion of the Circuit Court of Appeals (R. 97–105) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 11, 1935 (R. 106). A petition for rehearing was filed on January 19, 1935 (R. 106),

and was denied April 15, 1935 (R. 107). Petition for a writ of certiorari was filed May 2, 1935. Jurisdiction is conferred on this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. May the liability of a decedent for a tax of a dissolved corporation be enforced against his estate or the executors thereof under Sections 280 and 281 of the Revenue Act of 1926, notwithstanding the fact that the executors were discharged by the probate court in 1925?

2. If so construed, do Sections 280 and 281 violate the due-process clause of the Fifth Amendment?

3. Did the court below err in holding that the executor Hulburd was liable as a legatee transferee?

4. Was the enforcement of the liability barred by the statute of limitations?

STATUTES INVOLVED

The statutes involved are found in the Appendix, *infra*, pp. 16–24.

STATEMENT

From the findings of fact and the stipulation of facts by the parties, the following facts are taken:

DeForest Hulburd and Hugh McBirney Johnston, residents of Illinois, were executors and trustees under the will of Charles H. Hulburd, who

died January 14, 1924, a resident of Illinois. Mr. Johnston has died since the institution of this proceeding, leaving DeForest Hulburd as the only surviving executor and trustee. (R. 39, 67.)

DeForest Hulburd was also a legatee under the will (R. 20) and as such received cash of $20,685.79 in addition to other assets (R. 58–59, 67).

The decedent, Charles Hulburd, in his own right owned 80 shares of stock of the Van Sicklen Company of Elgin, Illinois (R. 38).

In 1919, this Illinois corporation sold all of its assets to the Van Sicklen Speedometer Company, a Delaware corporation, and was dissolved in September of that year. In consideration for the transfer, the Illinois corporation received $250,000 and 5,000 shares of stock of the Delaware company, all of which it distributed to its stockholders. (R. 37–38, 77.)

Charles H. Hulburd in his own right received $8,000 in cash and 160 shares of stock as his distributive share (R. 38, 77).

The Illinois corporation had filed a return for the fiscal year ending September 30, 1919, in December 1919. On November 17, 1924, the Commissioner made an additional assessment of income and profits taxes against the corporation in the amount of $227,872.06 plus a penalty of $113,936.03. These taxes have not been paid. (R. 67–69.)

On October 27, 1926, the Commissioner mailed a letter to the "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street,

Chicago, Illinois ", asserting a liability against the estate as a transferee of the Van Sicklen Company. It was then claimed that the estate was liable to the extent of $24,000 for taxes of the corporation, but it was later admitted that the liability does not exceed $8,000 (the distribution made in cash to Charles H. Hulburd) plus 6 percent interest from February 26, 1926. (R. 15–18, 68.)

On April 16, 1924, the executors had written to the Commissioner requesting that all taxes due on account of income received during the lifetime of Charles H. Hurlburd be assessed within one year after his death; that is, by January 14, 1925, in accordance with Section 250 (d) of the Revenue Act of 1921. This letter made no reference to the liability of the estate as a transferee. Deputy Commissioner Bright on April 20, 1925, replied that certain income taxes of the decedent would be at once listed for assessment and the case closed under Section 277 (a) (3). (R. 68, 77.)

On February 26, 1925, the executors had filed their final account with the probate court, which account was thereupon approved and the executors discharged (R. 64, 68).

On the first hearing the Board of Tax Appeals held that the collection of the deficiency was not barred by the statute of limitations. On the second hearing the Board held that the estate was not liable as a transferee and declined to decide whether the distributees of the assets of the estate were liable.

The Commissioner appealed and in support of the Board's decision the executor, Hulburd, urged both that there was no liability and that in any event the enforcement of the liability was barred by the statute of limitations.

The Circuit Court of Appeals reversed the Board's decision against the Government. It held that DeForest Hulburd was liable both as an executor and as a legatee (except that as a legatee he was only liable to the extent of $4,000) and that the statute of limitations did not bar the enforcement of the liability.

ARGUMENT

I

THE ASSESSMENT AND COLLECTION OF THIS LIABILITY ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

The decedent, Charles H. Hulburd, was clearly liable as a transferee of the Van Sicklen Company for its 1919 taxes, at least to the extent of the sum of $8,000, which he received upon the dissolution of the corporation in that year. He was liable notwithstanding the fact that the corporation acquiring the assets might also be liable. *Hunn* v. *United States*, 60 F. (2d) 430 (C. C. A. 8th); *Fairless* v. *Commissioner*, 67 F. (2d) 475 (C. C. A. 6th); see, also, *Pierce* v. *United States*, 255 U. S. 398.

The corporate return for the fiscal year ended September 30, 1919, was filed in December 1919, and the five-year period of limitation for assessment of the tax against the transferor would not have

expired until December 1924. Section 250 (d) of the Revenue Acts of 1918 and 1921 and Section 277 (a) (2) of the Revenue Act of 1924. Hence, when Mr. Hulburd died in January 1924, the liability was alive. We believe that the liability survived and became a valid claim against his estate. *Richmond* v. *Irons,* 121 U. S. 27; *Buck* v. *Helvering,* 73 F. (2d) 760 (C. C. A. 9th); *Spargo* v. *Converse,* 191 Fed. 823 (C. C. A. 2d).[1]

The assessment against the transferor was made November 17, 1924, within the five-year period, and after the passage of the Revenue Act of 1924. Hence, the Commissioner had six years within which to proceed against the transferor or transferee (Section 278 of the Revenue Act of 1924). *Russell* v. *United States,* 278 U. S. 181; *Updike* v. *United States,* 281 U. S. 489.

This six-year period would not have run until 1930. In the meantime, Section 280 of the Revenue Act of 1926 was enacted on February 26, 1926, and under Section 280 (b) (2) the Commissioner was compelled to proceed against the transferee before February 26, 1927. *Suisman & Blumenthal* v. *Eaton,* 74 F. (2d) 716 (C. C. A. 2d).

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[1] While the cases cited arose where liability of the stockholder was being enforced under a statute and not under the trust fund doctrine, we think the same rule would apply. The liability was enforced against the executor of the transferee in the *Phillips* case, *infra.* See opinion of the Circuit Court of Appeals for the Second Circuit in that case, 42 F. (2d) 177.

He did so, on October 27, 1926, sending a deficiency notice to "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Ill." On December 20, 1926, the executors petitioned the Board of Tax Appeals for a review of the Commissioner's determination.

The effect of the deficiency notice was to stay the running of the statute of limitations until the decision of the Board becomes final and for sixty days thereafter. Sections 274 (a), 277 (b), and 280 of the Revenue Act of 1926, and Section 505 of the Revenue Act of 1928, *infra*. See also *American Equitable Assur. Co. of New York* v. *Helvering*, 68 F. (2d) 46 (C. C. A. 2d); *Continental Products Co.* v. *Commissioner*, 66 F. (2d) 434 (C. C. A. 1st). The decision of the Board has not yet become final. Section 1005 of the Revenue Act of 1926, *infra*.

The petitioner urges that the notice of deficiency was not sufficient, since it was addressed to the "estate" which had been closed. But the courts have repeatedly held that taxpayers or transferees who receive notices of deficiency, and appeal to the Board from them, may not urge technical defects in them to question the jurisdiction of the Board or to say that the filing of them has not suspended the running of the statute of limitations. *Commissioner* v. *New York Trust Co.*, 54 F. (2d) 463 (C. C. A. 2d); *Haag* v. *Commissioner*, 59 F. (2d) 516

(C. C. A. 7th); *Burnet* v. *San Joaquin Fruit & Investment Co.*, 52 F. (2d) 123 (C. C. A. 9th); *Warner Collieries Co.* v. *United States*, 63 F. (2d) 34 (C. C. A. 6th); *In re Wolf Mfg. Industries*, 56 F. (2d) 64 (C. C. A. 7th); *American Equitable Assur. Co. of New York* v. *Helvering, supra; Continental Products Co.* v. *Commissioner, supra; Commissioner* v. *Nichols & Cox L. Co.*, 65 F. (2d) 1009 (C. C. A. 6th); *Buzard* v. *Helvering* (App. D. C.), decided April 1, 1935, not officially reported, but found in 1935 C. C. H., Vol. 3, par. 9288.

In view of these decisions, we submit that the notice of deficiency was sufficient to stay the running of the statute of limitations both as to the executors and as to Mr. Hulburd, as legatee, and that (assuming the discharge of the executors did not destroy their liability) the liability may still be enforced against the petitioner either as executor or as legatee.

The preceding argument is not dependent upon the assertion that Sections 280 and 281 of the Revenue Act of 1926 create a new liability, and hence is not in conflict with *Phillips* v. *Commissioner*, 283 U. S. 589, or *Michael* v. *Commissioner*, 75 F. (2d) 966 (C. C. A. 2d). We did not urge the contrary before the Circuit Court of Appeals, and we question whether the court meant to hold otherwise, although there is language in its opinion from which such an inference might be drawn.

II

THE DISCHARGE OF THE EXECUTORS WITHOUT NOTICE TO THE GOVERNMENT DOES NOT PREVENT THE ASSERTION OF THE LIABILITY AGAINST THEM

The court below held that the discharge of the executors was ineffective as against the Government, because the executors had not given notice of their discharge as required by Section 281 (b) of the Revenue Act of 1926. The petitioner, relying upon *Liberman's Committee* v. *Commissioner*, 54 F. (2d) 527 (C. C. A. 2d), claims that this section had no retroactive effect and only applied to executors appointed after the enactment of the Revenue Act of 1926.

We feel certain that the case of *Liberman's Committee* does not go so far. That case involved not an executor but guardians of a mentally incompetent person, and the court held that the Committee's authority ceased absolutely with the incompetent's death and was not revived by Section 281 (a), subsequently enacted. It should be noted, however, that the court strongly intimated that the notice might be deemed a sufficient notice to the executors under Section 281 (d), if the record had shown that the executors and the members of the former Committee were the same.

We believe that there are sufficient differences between the authority of a guardian of an incompetent and an executor of an estate to justify a difference in the application of the statute. More-

over, the Commissioner, in the *Liberman's Committee* case, had at least a constructive notice of the discharge, and here he did not.

In the court below, the Government did not rely so much upon Section 281 as upon the fact that in Illinois, as in many jurisdictions, a discharge of an executor is conclusive only as to matters presented in his ~~comments~~ accounts. *Cutright* v. *Stanford,* 81 Ill. 240; *Diversey* v. *Johnson,* 93 Ill. 547; *Starr* v. *Willoughby,* 218 Ill. 485; *Fraser* v. *Fraser,* 149 Ill. App. 186; *Maguire* v. *City of Macomb,* 293 Ill. 441.

When the estate was closed on February 26, 1925, without satisfying the liability of the decedent for the tax of the Van Sicklen Company, the Commissioner could no doubt have moved to have the order approving the account and discharging the executors set aside. Even if he had been required to do so within a reasonable time, a reasonable period had not expired when the Revenue Act of 1926 was passed on February 26, 1926, giving the Government a remedy for enforcing the liability and setting up an independent statute of limitations.

Hence, either under Sections 280 and 281, as the court below held, or under Section 280 alone, we submit that this liability which was alive when the Revenue Act of 1926 was passed became enforcible.

We see no reason why a state law providing when the administration of an estate shall be closed should be effective against the Government, when a state law saying when a corporation shall be

considered defunct is not binding on the Government. See *In re Wolf Mfg. Industries, supra; Commissioner* v. *Renyx,* 66 F. (2d) 260 (C. C. A. 2d); *Phillips* v. *Commissioner, supra.*

It is true that the same court which decided this case apparently held otherwise in *Haag* v. *Commissioner, supra,* but that case involved a question of jurisdiction, and the court sustained the Board's jurisdiction on the ground that the transferee was liable as a legatee, if not as an executrix.

Lindley v. *United States,* 59 F. (2d) 336 (C. C. A. 9th), relied upon by the petitioner, was a suit to recover an erroneous refund, not a proceeding to enforce a transferee liability, and the court, basing its decision largely on California law regarding the administration of estates,[2] held that the Government could recover from the legatees to whom the erroneous refund had been paid over, but not from the executors.

The petitioner also cites *Nauts* v. *Clymer,* 36 F. (2d) 207 (C. C. A. 6th). The deficiency notice in that case was mailed under the Revenue Act of 1924 (prior to the enactment of Sections 280 and 281) and the statute of limitations had run before those sections were enacted. The notice was sent

[2] For example, if a California estate is closed without payment of a debt, the creditor has no remedy except that if he had no notice he may sue the executor on his bond. See Secs. 951–956 of Probate Code, Deering's Code of Civil Procedure and Probate Code, 1931. There is no corresponding provision in the Illinois statutes. See Cahill's Illinois Revised Statutes, 1929, c. 3, Secs. 114, 119–120.

to one of three former executors and no appeal was taken to the Board. The tax proposed was paid and suit to recover it was brought in the District Court. While the Circuit Court of Appeals held that the notice was insufficient under the facts in that case, it implied that under different circumstances a notice to an acting executor might be sufficient.

Hence, each of the cases relied upon by the petitioner may be distinguished in part on the facts.

In several earlier cases, the Board of Tax Appeals held that the discharge of an executor does not deprive the United States of its right to proceed against him. See *Evans* v. *Commissioner,* 12 B. T. A. 334; *Kaufmann* v. *Commissioner,* 15 B. T. A. 141, affirmed, 44 F. (2d) 144 (C. C. A. 3d).

We concede, therefore, that there is a possible conflict in principle between decisions on this one point, but question whether it is sufficient to justify a review in this case.

III

IF NOT LIABLE AS EXECUTOR, THE PETITIONER HULBURD IS LIABLE AS A LEGATEE

The court below held that the petitioner was liable as a legatee to the extent of $4,000, he having received one-half of the residuary estate of the decedent.

As to this point, the petitioner urges, first, that the Circuit Court of Appeals was not at liberty to consider this issue, since it was not raised before the Board, and, second, that he could not be held

liable as a legatee unless assets of the Van Sicklen Company were traced into his hands.

Some of the Circuit Courts of Appeals have declined to consider issues which have not been raised before the Board of Tax Appeals. *Helvering* v. *J. L. Brandeis & Sons*, 75 F. (2d) 487, 489 (C. C. A. 8th); *Tulsa Tribune Co.* v. *Commissioner*, 58 F. (2d) 937 (C. C. A. 10th); *Glassell* v. *Commissioner*, 42 F. (2d) 653 (C. C. A. 5th); *Hartley* v. *Commissioner*, 72 F. (2d) 352 (C. C. A. 8th), affirmed on other grounds by this Court, April 29, 1935; *Atkins' Estate* v. *Lucas*, 36 F. (2d) 611 (App. D. C.); *Tricou* v. *Helvering*, 68 F. (2d) 280 (C. C. A. 9th); and *contra*, *Helvering* v. *General Utilities & Operating Co.*, 74 F. (2d) 972 (C. C. A. 4th); [1] *Guy* v. *Commissioner*, 35 F. (2d) 139 (C. C. A. 4th).

But we think the Circuit Courts of Appeals may consider questions of law not raised below when justice so requires. *Helvering* v. *General Utilities & Operating Co.*, *supra*. The issue before the Board is the correctness of the deficiency, and not the Commissioner's method of arriving at it (*Hughes* v. *Commissioner*, 38 F. (2d) 755 (C. C. A. 10th); *Atlanta Casket Co.* v. *Rose*, 22 F. (2d) 800 (C. C. A. 5th)), and when the facts are not in dispute and no additional evidence is required to present the new issue, we think the court may entertain it, if it chooses to do so.

It is a rule of this Court that it will not consider on a writ of certiorari issues not raised below.

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[1] That case is now pending before this Court on petition for a writ of certiorari, No. 939, October Term, 1934.

Blair v. *Oesterlein Co.*, 275 U. S. 220; *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415. But that is a rule of practice rather than a limitation of power. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555.

Similarly, we think that the court below had power to consider the question whether the petitioner was liable as a legatee. That question and the question whether he was liable as an executor turned on the same basic facts, and in reality were but different theories of the same general issue, namely, whether the petitioner was liable as a transferee.

The petitioner further contends that he was not liable as a legatee, since the Commissioner failed to prove that any part of the $8,000 in cash which was distributed to the decedent came into his hands.

The Commissioner proved that the petitioner as residuary legatee received in cash from the decedent's estate an amount far in excess of the sum of $8,000. We believe that is sufficient to make him liable as a transferee, and that it is not necessary to prove that the particular dollars that were transferred from the Van Sicklen Company to the decedent were thereafter transferred to the petitioner. There are no decisions directly in point on this issue, and it is not important if the petitioner was also liable as an executor.

The petitioner asks us to direct the attention of the Court to *United States* v. *Hart*, decided by the District Court for the Eastern District of Pennsyl-

vania on April 1, 1935, not yet officially reported, but found in 1935 C. C. H., Vol. 3, ¶ 9273. The question involved in that case was whether the Government might recover in an action at law against a residuary legatee of a taxpayer an amount erroneously refunded to the taxpayer. We do not believe that the decision is in point or in any way controlling.

CONCLUSION

The petitioner states that if Sections 280 and 281 of the Revenue Act of 1926 are construed as applicable to the discharged executors in this case, the statute violates the due process clause of the Fifth Amendment. He cites no authorities in support of this proposition and we know of none. It was not considered by the court below. Hence, we make no further reply to this contention.

There is no substantial conflict presented herein. The case turns largely upon its particular facts. Furthermore, the case is not of sufficient importance to justify a review by this Court. The petition should be denied.

Respectfully submitted,

STANLEY REED,
Solicitor General.

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.

MAY 1935.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1082:

> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227, 264:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act

or under prior income, excess-profits, or war-profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided*, That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 277 (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes", approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(U. S. C., Title 26, Sec. 1057.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that

there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.
(U. S. C. App., Title 26, Sec. 1046.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes", approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any

such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

(U. S. C. App., Title 26, Sec. 1057.)

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect

of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act, but assessment against the taxpayer was made within such period, then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

* * * * *

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

(U. S. C. App., Title 26, Sec. 1069.)

SEC. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(U. S. C. App., Title 26, Sec. 1070.)

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

* * * * *

(U. S. C. App., Title 26, Sec. 1064.)

SEC. 1005. (a) The decision of the Board shall become final—

* * * * *

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the ex-

piration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(U. S. C. App., Title 26, Sec. 1228.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 870:

SEC. 505. SAME—TRANSFEREE CASES.

(a) Section 280 (d) of the Revenue Act of 1926 is amended to read as follows:

"(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability

of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter."

* * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 39

DE FOREST HULBURD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The two opinions of the Board of Tax Appeals (R. 68–80) are reported in 21 B. T. A. 23 and 27 B. T. A. 1123. The opinion of the Circuit Court of Appeals (R. 90–100) is reported in 76 F. (2d) 736.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 11, 1935. (R. 101.) A peti-

tion for rehearing was filed on January 19, 1935 (R. 101), and was denied April 15, 1935 (R. 102). The petition for a writ of certiorari was filed May 2, 1935, and granted June 3, 1935. (R. 102.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. May the liability of a decedent for a tax of a dissolved corporation be enforced against his estate or the executors thereof under Sections 280 and 281 of the Revenue Act of 1926, notwithstanding the fact that the executors were discharged by the probate court in 1925?

2. Was notice to the executor after discharge sufficient to stay the running of the statute of limitations under Section 277 (b) and to apprise petitioner of his liability as legatee?

3. Did the court below err in holding that the executor Hulburd was liable as a legatee transferee, that question not having been raised in nor considered by the Board of Tax Appeals?

4. Is petitioner liable as the legatee of a decedent with an unpaid tax liability or as the recipient of property impressed with a trust?

STATUTES INVOLVED

The statutes involved are found in the Appendix, *infra*, pp. 34–42.

STATEMENT

From the findings of fact (R. 68–69) and the stipulation of facts by the parties (R. 36–39), the following facts are taken:

DeForest Hulburd and Hugh McBirney Johnston, residents of Illinois, were executors and trustees under the will of Charges H. Hulburd, who died January 14, 1924, a resident of Illinois. Mr. Johnston has died since the institution of this proceeding, leaving DeForest Hulburd as the only surviving executor and trustee (R. 40, 68).

DeForest Hulburd was also a legatee under the will (R. 21–22) and as such received cash of $20,685.79 in addition to other assets. (R. 59–60.)

The decedent, Charles Hulburd, in his own right owned 80 shares of stock of the Van Sicklen Company of Elgin, Illinois (R. 38).

In 1919, this Illinois corporation sold all of its assets to the Van Sicklen Speedometer Company, a Delaware corporation, and was dissolved in September of that year. In consideration for the transfer, the Illinois corporation received $250,000 and 5,000 shares of stock of the Delaware company, all of which it distributed to its stockholders. (R. 38.)

Charles H. Hulburd in his own right received $8,000 in cash and 160 shares of stock as his distributive share. (R. 38–39.)

The Illinois corporation had filed a return for the fiscal year ending September 30, 1919, in De-

cember, 1919. On November 17, 1924, the Commissioner made an additional assessment of income and profits taxes against the corporation in the amount of $227,872.06 plus a penalty of $113,936.03. These taxes have not been paid. (R. 68–69.)

On April 16, 1924, the executors had written to the Commissioner requesting that all taxes due on account of income received during the lifetime of Charles H. Hulburd be determined and assessed within one year, in accordance with Section 250 (d) of the Revenue Act of 1921. This letter made no reference to the liability of the estate as a transferee. Deputy Commissioner Bright on April 20, 1925, replied that certain income taxes of the decedent would be at once listed for assessment and the case closed under Section 277 (a) (3). (R. 69, 78–79.)

On February 26, 1925, the executors filed their final account with the probate court, which account was thereupon approved and the executors discharged. (R. 62–66, 69.)

On October 27, 1926, the Commissioner mailed a letter to the "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Illinois", asserting a liability against the estate as a transferee of the Van Sicklen Company. It was then claimed that the estate was liable to the extent of $24,000 for taxes of the corporation, but it was later admitted that the liability does not exceed $8,000 (since $16,000 was paid by decedent

to the equitable owners of the stock, R. 38), plus 6 percent interest from February 26, 1926. (R. 15–19, 69.)

On the first hearing the Board of Tax Appeals held that the collection of the deficiency was not barred by the statute of limitations. (R. 68–76.) On the second hearing the Board held that the estate was not liable as a transferee and declined to decide whether the distributees of the assets of the estate were liable. (R. 76–80.)

The Commissioner appealed and in support of the Board's decision the executor, Hulburd, urged both that there was no liability and that in any event the enforcement of the liability was barred by the statute of limitations.

The Circuit Court of Appeals reversed the Board's decision. It held that DeForest Hulburd was liable both as an executor and as a legatee and that the statute of limitations did not bar the enforcement of the liability (R. 90–100).

SUMMARY OF ARGUMENT

Upon the dissolution of the Van Sicklen Company in 1919, the decedent received a distribution of $8,000 in cash. Within the statutory period of limitations the Commissioner determined a deficiency in tax against the corporation for the fiscal year ended September 30, 1919, in the sum of $227,872.06. Hence, if the decedent had lived, the Commissioner might have instituted a suit in equity against him for the payment of $8,000, plus interest,

and after the enactment of Section 280 of the Revenue Act of 1926, *infra*, could have enforced this liability under that provision.

This liability survived the decedent's death and his executors became liable in their representative capacity for the payment of his liability to the Government as a transferee or distributee of the corporate property. The discharge of the executors was conclusive under Illinois law only as to matters presented in the final account and does not bar the Government from pursuing any available remedy to enforce the obligation of the estate. In any event, state laws barring claims against decedent's estates are merely statutes of limitation and do not run against the United States.

The notice addressed to petitioner as executor was sufficient, in the light of his subsequent petition to the Board of Tax Appeals, to stay the running of the statute of limitations. It also served to charge him with notice of his alternative liability as legatee.

The petitioner is liable for the tax as a statutory transferee because he received distributions in cash from the estate far in excess of the amount claimed by the Government. The statute (Section 280(3)(f)) expressly includes legatees, distributees, etc., within the term "transferee." Petitioner, therefore, is liable both as an executor and as legatee.

The creditor of a corporation may recover after its dissolution from distributees, whether or not the

specific property can be traced. Under Illinois law petitioner, who has received property in excess of the amount owed by the decedent stockholder, is liable for the unpaid taxes of the corporation, and this liability may be enforced under section 280.

Petitioner received funds from the decedent which in turn had been received as a dividend on dissolution of a corporation owing unpaid taxes. These moneys were impressed with a trust in favor of the Government. To the extent that the aggregate of the intermingled fund consisting of the trust funds and those of the decedent or legatee remained intact, the trust funds can be traced. Petitioner, on whom the burden rests after the Commissioner has made a *prima facie* case, has not shown that the fund was reduced below the $8,000 received from the corporation, and the Government can recover the entire amount.

ARGUMENT

I

THE DISCHARGE OF THE EXECUTORS WITHOUT NOTICE TO THE GOVERNMENT DOES NOT PREVENT THE ASSERTION OF LIABILITY AGAINST THEM WHERE THE ORIGINAL DEFICENCY WAS TIMELY MADE

In the instant case, the decedent was clearly liable as a transferee of the taxpayer for its 1919 taxes to the extent of the sum of $8,000, which he received upon the dissolution of the corporation in that year. He was liable notwithstanding the fact that the corporation acquiring the assets might also

be liable. *Hunn* v. *United States*, 60 F. (2d) 430 (C. C. A. 8th); *Fairless* v. *Commissioner*, 67 F. (2d) 475 (C. C. A. 6th); see also *Pierce* v. *United States*, 255 U. S. 398, 404–405.

The so-called transferee provisions were first incorporated into the Federal tax system by the Revenue Act of 1926, Sections 280 and 281, *infra*. Section 280 provides for the assessment and collection, in the same manner as in the case of a deficiency in a tax, of "the liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax" imposed upon the taxpayer under that Act or any prior income or profits tax act. Section 281 provides that where the Commissioner has notice of any person acting in a fiduciary capacity for the person subject to the liability specified in Section 280, the fiduciary shall assume, on behalf of such person, the same liability (except it shall be collected from the estate of such person) *"until notice is given that the fiduciary capacity has terminated."*

These provisions did not create a new liability on the part of the transferees but provided the Government with a new remedy for enforcing the existing liability, theretofore enforcible only by bill in equity or action at law. *Phillips* v. *Commissioner*, 283 U. S. 589, 594, 601; House Conference Report No. 356, 69th Cong., 1st Sess., pp. 43, 44.

The constitutionality of Section 280 as applied to the enforcement, against the executors of a stock-

holder-transferee, of tax liability arising under a prior revenue act was upheld by this Court in the *Phillips* case, *supra*. Although the question of the retroactive application of Section 281, involving the liability of fiduciaries, appears not to have been raised, it was the executors of the stockholder-transferee in that case who appealed to the Board and who were finally held to be liable, as the court below likewise held in the instant case. See *Phillips* v. *Commissioner*, 42 F. (2d) 177 (C. C. A. 2d). The facts in the *Phillips* case are substantially identical with those presented here, except that there the executors had not been discharged at the time the Commissioner asserted liability against the estate.

Petitioner contends, in short, that the discharge of the executors and distribution of the estate has barred the Government from asserting any claim against the executors in their representative capacity. It is submitted that this circumstance cannot bar the United States from the collection of taxes to which it is entitled.

Although relying upon their discharge to terminate any liability of the decedent's estate for taxes, the executors here did not wait the full year provided by Section 250 (d), *infra*, before distributing the estate and requesting discharge. The request to the Commissioner, for determination of all income taxes due from the decedent was made April 16, 1924 (R. 27-28); the Commissioner answered

April 20, 1925, asserting deficiencies on account of the decedent's own income for the years 1922 and 1923 (R. 28). The executors, before the expiration of the year, had on February 26, 1925, filed their final account (R. 49–64) and asked to be discharged. The request was granted on the same day. Thus, it appears that as to the decedent's own taxes for the years 1922 and 1923, deficiencies were asserted by the Commissioner on April 20, 1925 (approximately two months after their discharge) and, certainly, as to these deficiencies the premature discharge of the executors could not defeat the Government's claim. Similarly, it is submitted, such a discharge was ineffective as to the decedent's transferee liability and constituted no bar to its assertion and enforcement upon discovery by the Commissioner.

Whether or not the executor is liable for taxes assessed after his discharge is a matter of congressional intent. *Rankin* v. *Barton,* 199 U. S. 228; *Christopher* v. *Norvell,* 201 U. S. 216, 235; *Phillips* v. *Commissioner, supra,* 602–603. In *Forrest* v. *Jack,* 294 U. S. 158, which involved a liability of a stockholder of an insolvent national bank, this Court gave effect to the Utah law which exempted the fiduciaries but imposed a liability upon the estate of the deceased stockholder. It was held (p. 162):

> He [the Comptroller] acts under federal authority, and in respect of such determinations, orders and assessments may not be

> trammeled, controlled or prevented by state laws. In the absence of federal enactments relating to procedure for enforcement of the liability imposed by Section 66 [U. S. C., Title 12], collection is to be made in accordance with state laws governing claims against estates of deceased persons, at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority.

Thus, the question to be decided is whether Congress intended that the executor be immune after his discharge.

Since Congress professed to create no new liability, the question divides into two parts: (1) Under preexisting law, was the executor liable? (2) If not, was his immunity a true absence of liability or merely the availability of a valid plea in bar, akin to a statute of limitations?

1. The liability of a transferee for taxes due from the transferor would, in the absence of Federal legislation, be determined in the light of ordinary equitable principles. If the status of the executor were such that discharge interposed no bar to enforcement against him, he would be liable in equity and equally under the new procedure provided by Section 280. To determine his status, in the absence of Federal legislation, it is necessary to look to the State law. *Forrest* v. *Jack, supra,* 163; *Phillips* v. *Commissioner, supra,* 602–603.

It seems that in Illinois the discharge of the executor and distribution of the estate imposes no bar to the collection of this tax. The Illinois statutes contain no relevant provision as to discharge[1] and the rule of law in that State is that a discharge of executors is conclusive only as to matters presented in their accounts. *Starr* v. *Willoughby*, 218 Ill. 485; *Diversey* v. *Johnson*, 93 Ill. 547; *Fraser* v. *Fraser*, 149 Ill. App. 186; *Maguire* v. *City of Macomb*, 293 Ill. 441. In the *Starr* case, *supra*, the court said (p. 493):

> And it has been repeatedly held by this court that an order of the county court discharging an administrator or executor on a final accounting when the estate is not fully settled, as to the unsettled portion of the estate is void.

See also *Griffith* v. *Godey*, 113 U. S. 89; Woerner, *American Law of Administration* (3d Ed.), Vol. 3, p. 1960; Schouler on Wills (5th Ed.), Vol. 2, Sec. 1528.

The nonconclusive effect of the Illinois executor's discharge operates to permit suit on claims which arose after the termination of his administration. This is shown by Sections 119–120 of Chapter 3 of Cahill's Illinois Statutes (1929), which provide that the executor may require a bond from the dis-

[1] The statutes provide merely that no final settlement shall be approved until legatees and creditors whose claims have not been satisfied are notified, and require yearly settlements until administration is fully completed. Cahill's Illinois Revised Statutes, 1929, c. 3, Section 114.

tributees to indemnify him should the distributees fail "to refund the due proportion of any debt which may afterwards appear against the estate."

In *Cutright* v. *Stanford*, 81 Ill. 240, it was held that an administrator could recover from the distributees the amount of a stockholder's liability of the decedent which arose and was paid by him a year after the distribution of the estate and his discharge. In *Mortimer* v. *Potter*, 213 Ill. 178, 182, the receiver of a national bank enforced a stockholder's liability of the decedent. The court said:

> * * * at the time the administration of his estate was closed the claim had not accrued. The liability arose more than twenty years after the expiration of the two years within which claims could have been filed against it in the probate court. But the remedy under the act of Congress is applicable, and the estate is liable under its provisions so long as the assets can be reached. * * *

The liability, it seems, may also be enforced against the legatee, even without an unsatisfied judgment against the executor. In *Sutherland* v. *Harrison*, 86 Ill. 363, the devisees forced the sole legatee to satisfy a vendor's lien on real estate, since it was also a personal debt of the decedent. While not directed toward the liability of the executor, the court's language (pp. 370–371) is instructive.

> There is the minor objection taken that the settlement of the estate and discharge of

> the administrators by the probate court; and the former suit between the parties, should be held as conclusive of the right of appellant to all the personal estate.
>
> The settlement of the estate involved nothing in respect to the validity of this debt in question.
>
> Not having matured during the time of the administration, it does not appear to have been proved or presented for settlement, the creditor relying, as would seem, on his vendor's lien. * * *
>
> Neither the settlement of the estate, nor such suit, determined the right of appellant to any specific personal property as regards quantity or amount, and we do not perceive wherein they can be held to have the effect to preclude appellees from enforcing their right to have the personal estate of the decedent applied to the payment of his debt.

Therefore, even though the Revenue Act of 1926 created no new liability, the petitioner's liability could have been enforced in an ordinary equity action under Illinois law. It follows that it could be enforced by the alternative remedy provided in Section 280.

2. Even were this liability thought one which is ordinarily unenforceable under the State doctrine of discharge, it could be enforced by the United States.

The original liability of the executors, as the representatives of a transferee, is clear. *Phillips* v. *Commissioner, supra.* Their asserted immunity

from collection by the Government rests upon the equivalent of a plea in bar, that the collection may no longer be made. This plea takes the form that the State statute of limitations prevents collection. The State law is not in terms a statute of limitations, in the ordinary sense of providing for the dismissal of suits brought after a specified period. Instead, petitioner argues (mistakenly, as we have demonstrated, *supra*, pp. 12–14) that the State law bars collection, not after a definite period, but after a specified event, discharge and distribution. Since the original liability remains untouched and is not extinguished (*Campbell* v. *Holt*, 115 U. S. 620, 628), this bar to collection must relate only to the remedy and is no more than a statute of limitations.

It is well settled that State statutes of limitation do not bar against a claim of the United States. *United States* v. *Nashville & St. Louis Ry. Co.*, 118 U. S. 120; *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 125; *United States* v. *Whited & Wheless*, 246 U. S. 552, 561; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Phillips* v. *Commissioner*, *supra*, 602–603.

It follows that the liability of an estate for unpaid taxes cannot be defeated by interposing the bar of discharge and distribution. Even were this a good plea under State law, it would be no more than a plea of a statute of limitations and could not be applied to a tax claim of the United States. Two cases in the Board of Tax Appeals have so

held. *Evans* v. *Commissioner*, 12 B. T. A. 334; *Kaufman* v. *Commissioner*, 15 B. T. A. 141, affirmed, 44 F. (2d) 144 (C. C. A. 3d).

There is no merit to petitioner's argument that the "defunct" character of the estate, or the "nonexistent" status of the executors, can bar the application of this statute. State laws, prescribing the time when a dissolved corporation shall be considered defunct, or claims against its transferees or officers barred, are ineffective against a tax claim of the United States. *Phillips* v. *Commissioner*, *supra*, 602–603; *In re Wolf Mfg. Industries*, 56 F. (2d) 64 (C. C. A. 7th); *Commissioner* v. *Renyx*, 66 F. (2d) 260 (C. C. A. 2d); *Baumgartner* v. *Commissioner*, 51 F. (2d) 472 (C. C. A. 9th); certiorari denied 284 U. S. 674; *Buzard* v. *Helvering*, 77 F. (2d) 391 (App. D. C.).

The cases relied upon by the petitioner may be distinguished upon the facts and, in any event, do not require a like result here. In *Liebman's Committee* v. *Commissioner*, 54 F. (2d) 527 (C. C. A. 2d), the Commissioner was held without power to assess a deficiency against a former fiduciary, although there had been no notice of his discharge prior to the Government's assertion of liability under Section 281 (a), *infra*. That case involved not an executor but guardians of a mentally incompetent person, and the court held that the committee's authority ceased absolutely with the incompetent's death and was not revived by Section 281 (a),

subsequently enacted. Although the opinion uses language which is opposed to the approach of the court below, we believe the fact that the power and fiduciary capacity of the committee exists only during the life of the incompetent, while the executor has a continuing status as the representative of the decedent, justifies a difference in the application of the statute. Moreover, the Commissioner in the *Liberman's Committee* case, had at least a constructive notice of the discharge, and here he did not.

Lindley v. *United States*, 59 F. (2d) 336 (C. C. A. 9th), was a suit to recover an erroneous refund, not a proceeding to enforce a transferee liability, and the court, basing its decision on California law regarding administration of estates,[2] held that the Government could recover from the legatees to whom the erroneous refund had been paid over, but not from the executors.

For the foregoing reasons, it is submitted that under State law the liability of the estate for the decedent's debts did not cease upon the executor's discharge, but was alive when the Revenue Act of 1926 was passed and became enforcible under the

[2] For example, if a California estate is closed without payment of a debt, the creditor has no remedy except that if he had no notice he may sue the executor on his bond. See Sec. 955 of Probate Code, Deering's Code of Civil Procedure and Probate Code, 1931. There is no corresponding provision in the Illinois statutes. See Cahill's Illinois Revised Statutes, 1929, c. 3, Secs. 114, 119–120.

new procedure provided for therein. In any event, any State period of limitation which may be found in its law of decedents' estates cannot defeat a tax claim of the United States. Under either theory, we maintain the petitioner is liable as the surviving executor.

The petitioner's construction (Br. 14–17) of the court's statement (R. 96) with respect to the remedy created and defined by Sections 280 and 281, and the assumption based thereon that the court misapprehended the nature of the *remedy* provided by Sections 280 and 281 is believed to be erroneous. As pointed out above, the legislative history of these provisions and this Court's decision in the *Phillips* case, *supra,* make it abundantly clear that these sections of the statute did not create a new right but merely provided an additional remedy for enforcing the existing right against transferees in proceedings like those applicable to an original taxpayer. Although the language of the opinion referred to may not be particularly apt, it is submitted that it appears from the context thereof the court had in mind the Commissioner's *right* to enforce the *remedy* provided by these new sections as distinguished from any *other remedy* which the Commissioner might have invoked under the *trust fund theory.*

II

THE DEFICIENCY NOTICE WAS SUFFICIENT TO STAY THE RUNNING OF THE STATUTE OF LIMITATIONS AND TO CHARGE PETITIONER WITH NOTICE OF HIS LIABILITY AS LEGATEE

1. The deficiency notice was addressed to "Estate of Charles H. Hulburd, c/oor DeForest Hulburd, 86 East Randolph Street, Chicago, Illinois." (R. 15.) Petitioner argues that this notice was insufficient to stay the running of the statute of limitations, because the estate was not in existence at the time and the executors had been discharged.

But petitioner, with the other executor, petitioned the Board of Tax Appeals for redetermination of the tax. Their petition described themselves as "the persons appointed executors". (R. 5, 10.) It is well settled that those who petition the Board for redetermination are estopped from questioning either the jurisdiction of the Board or the sufficiency of the notice. *Commissioner* v. *New York Trust Co.*, 54 F. (2d) 463 (C. C. A. 2d), certiorari denied, 285 U. S. 556; *Haag* v. *Commissioner*, 59 F. (2d) 516 (C. C. A. 7th); *Burnet* v. *San Joaquin Fruit & Investment Co.*, 52 F. (2d) 123 (C. C. A. 9th); *Warner Collieries Co.* v. *United States*, 63 F. (2d) 34 (C. C. A. 6th); *American Equitable Assurance Co. of New York* v. *Helvering*, 68 F. (2d) 46 (C. C. A. 2d); *Continental Products Co.* v. *Commissioner*, 66 F.

(2d) 434 (C. C. A. 1st); *Buzard* v. *Helvering*, 77 F. (2d) 391 (App. D. C.); *Commissioner* v. *Nichols & Cox Lumber Co.*, 65 F. (2d) 1009 (C. C. A. 6th); *Pittsburgh Terminal Coal Corp.* v. *Heiner*, 56 F. (2d) 1072. (W. D. Pa.)

The petitioner relies upon *Nauts* v. *Clymer*, 36 F. (2d) 207 (C. C. A. 6th). The notice there was sent to one of three former executors, three years after their discharge. No appeal was taken to the Board for a redetermination. The Circuit Court of Appeals properly held that the notice was insufficient.

Moreover, petitioner as executor was liable both under Illinois law and because his plea of discharge was ineffective against a tax claim of the United States (see *supra*, pp. 11–16). The distribution of the estate and the discharge of the executor were thus immaterial to the liability of petitioner as executor, and the deficiency notice was properly sent to him.

2. The notice was also sufficient to charge petitioner with his individual liability as transferee of the corporate assets and legatee of the decedent who received cash on dissolution of the corporation. He was charged with knowledge of the Illinois law which enabled the executor to recover from the distributee of the estate the amount which had been paid after distribution and discharge. *Cutright* v. *Stanford*, *supra*. He was charged with knowledge that as a legatee he was individually subject to the tax liability. *Sutherland* v. *Harrison*, *supra*.

The deficiency letter is not a formal common law pleading but is designed to secure substantial justice both to the taxpayer and to the Government. The Commissioner, who apparently had received no notice of the termination of the fiduciary capacity, naturally addressed the notice to petitioner as executor. It does not seem that petitioner should be heard to say that the letter he received in one capacity gave him no notice of his liability in another capacity.

The record shows that petitioner appeared before the Board of Tax Appeals not only as an executor but also individually as a legatee. (R. 5–6, 75, 85, 89, 90, 101.) It follows, therefore, that he is estopped to contest the sufficiency of the notice in either capacity (*supra*, pp. 19–20), and the Board had full power to impose liability on petitioner in either capacity. The Circuit Court of Appeals properly reversed for erroneous failure to do so.

Even had petitioner not appeared before the Board in his individual capacity, the liability could be imposed. If this notice were insufficient to base an assessment against petitioner as legatee, it is also insufficient to stay the statute of limitations as to him in this capacity and the Government will forever be barred from collection of a tax rightly due to it. In such a case petitioner cannot avoid the tax by formalistic and technical objections to the address which was typed at the head of the sixty-day letter.

Were petitioner as executor bringing suit for refund of taxes allegedly erroneously collected, the Government could plead his liability as legatee by way of recoupment. *White* v. *Stone*, 76 F. (2d) 136 (C. C. A. 1st), certiorari denied, October 14, 1935, No. 202; see *Lewis* v. *Reynolds*, 284 U. S. 281; *Bull* v. *United States*, 295 U. S. 247. True, this is a summary proceeding by way of deficiency notice and assessment. "But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign." *Bull* v. *United States*, *supra*, 260.

It has so been held in several courts of appeals. In *Haag* v. *Commissioner*, *supra*, the Commissioner sent the deficiency notice to the executrix. She had been discharged prior to receipt of the notice. The court held the notice sufficient because (p. 518):

> * * * the legatee under the will of her deceased brother became liable for the tax which, but for the completed administration of the estate, would have been assessed against [herself as] the executrix * * *."

In *Warner Collieries Co.* v. *United States*, *supra*, action taken by the representatives of both the transferor and transferee corporations, in the name of the transferor which had dissolved long before the deficiency notice was sent, was held to bind the transferee. In *Buzard* v. *Helvering*, *supra*, a petition to the Board, taken by the trustees of a corporation which was dissolved before receipt of a

deficiency notice to the corporation, was held to bind them as trustees, although the petition was in the name of the corporation.

Similarly, action taken by petitioner as executor cannot without injustice be held to have no application to his alternative liability as legatee.

III

IF NOT LIABLE AS EXECUTOR, THE PETITIONER WAS LIABLE AS A LEGATEE

The court below held the petitioner liable as a legatee, he having received one-half of the residuary estate of the decedent. The sum received (approximately $20,000, R. 60) was far in excess of the liability of the decedent, in the amount of $8,000. Although the language of the court's opinion (R. 98) is not entirely clear as to whether the court intended to hold this petitioner liable for only one-half of the tax ($4,000) or for the entire liability ($8,000), it is submitted this Court's decision in the *Phillips* case, *supra,* compels the conclusion that if the petitioner is liable at all as a legatee, or distributee, he is liable for the full amount and not the pro rata share thereof based upon the proportion of property which he received.

The court below held that the petitioner's liability as a legatee came within the language of Section 280 (3) (f), which provides:

> As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

It is submitted that this is a reasonable construction of the statute. Cf. *Baumgartner* v. *Commissioner, supra; Rankin* v. *City of Big Rapids,* 133 Fed. 670 (C. C. A. 6th). If it be objected that this section refers only to the legatee of a taxpayer, it is sufficient that a transferee is considered to be a taxpayer where necessary to avoid injustice. *United States* v. *Updike,* 281 U. S. 489, 493; *Liberman's Committee* v. *Commissioner, supra.*

Petitioner's chief challenge to the court's enforcement of his liability as legatee is based upon the fact that his liability as such was not raised before the Board of Tax Appeals. (R. 94.) From this it is argued the court was without authority to consider the question. While some of the circuit courts of appeals have declined to consider issues not raised before the Board,[3] it is submitted such a construction of the statute "is not consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals" (*Helvering* v. *Taylor,* 293 U. S. 507, 516), or with the jurisdiction of the circuit courts of appeals to affirm or reverse "as justice may require." Section 1003 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110.

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[3] *Helvering* v. *J. L. Brandeis & Sons,* 75 F. (2d) 487, 489 (C. C. A. 8th); *Tulsa Tribune Co.* v. *Commissioner,* 58 F. (2d) 937 (C. C. A. 10th); *Glassell* v. *Commissioner,* 42 F. (2d) 653 (C. C. A. 5th); *Hartley* v. *Commissioner,* 72 F. (2d) 352 (C. C. A. 8th), affirmed on other grounds by this Court, 295 U. S. 216; *Tricou* v. *Helvering,* 68 F. (2d) 280 (C. C. A. 9th).

The issue before the Board is the correctness of the deficiency and not the Commissioner's method of arriving at it (*Hughes* v. *Commissioner*, 38 F. (2d) 755 (C. C. A. 10th); *Atlanta Casket Co.* v. *Rose*, 22 F. (2d) 800 (C. C. A. 5th)), and when the facts are not in dispute and no additional evidence is required to present the new issue, we think the court may entertain it, if it chooses to do so. The following cases have so held: *Helvering* v. *General Utilities & Operating Co.*, 74 F. (2d) 972 (C. C. A. 4th);* *Virginia-Lincoln Furniture Corp.* v. *Commissioner*, 56 F. (2d) 1028 (C. C. A. 4th); *Commissioner* v. *Norfolk Southern Ry. Co.*, 63 F. (2d) 304 (C. C. A. 4th); *Griffiths* v. *Commissioner*, 50 F. (2d) 782 (C. C. A. 7th); *Lewis-Hall Iron Works* v. *Blair*, 23 F. (2d) 972 (App. D. C.); *L. J. Cristopher Co.* v. *Commissioner*, 55 F. (2d) 530 (App. D. C.); *Hurwitz* v. *Commissioner*, 45 F. (2d) 780 (C. C. A. 2d); *Seufert Bros. Co.* v. *Lucas*, 44 F. (2d) 528 (C. C. A. 9th). In other cases the appellate court has properly refused to consider issues not raised before the Board and as to which the record contained insufficient information for their determination. *Sakaba Oil Corp.* v. *Commissioner*, 71 F. (2d) 370 (C. C. A. 5th); *Atkins' Estate* v. *Lucas*, 36 F. (2d) 611 (App. D. C.).

Moreover, this Court will consider on certiorari, questions passed upon by the Circuit Court of Appeals but not raised in nor considered by the trial

* Now pending before this Court on writ of certiorari, No. 41, October Term, 1935.

court. See *Friend* v. *Talcott*, 228 U. S. 27, 36, wherein it is stated:

> There is a contention that the questions of waiver and election, although passed on by the court below, are not open for our consideration because it is asserted they were not raised in or considered by the trial court. As we think the contention is without merit, we proceed to dispose of the propositions concerning election and waiver and *res judicata*.

The ordinary refusal of appellate courts to pass upon issues which were not raised below is a rule of practice only, and involves no limitation of judicial power. *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Cole* v. *Ralph*, 252 U. S. 286, 290; *Chase, Jr.*, v. *United States*, 256 U. S. 1.

In the circumstances here, we think that the court below had power to consider the question whether the petitioner was liable as a legatee. That question and the question whether he was liable as an executor turned on the same basic facts, and in reality were but different theories of the same general issue, namely, whether the petitioner was liable as a *transferee*.

The petitioner further contends that he was not liable as a legatee, since the Commissioner failed to prove that any part of the $8,000 in cash which was distributed to the decedent came into his hands. The Commissioner proved that the petitioner as residuary legatee received in cash from the decedent's estate an amount far in excess of

the sum of $8,000. We believe that it is sufficient to make him liable as a statutory transferee, and that it is not necessary to prove that the particular dollars that were transferred from the taxpayer to the decedent were thereafter transferred to the petitioner. *Phillips* v. *Commissioner, supra.* And see *infra,* pp. 27–28, 29–32.

IV

PETITIONER IS LIABLE AS ONE WHO HOLDS PROPERTY OF A CORPORATION WHICH DISSOLVED OWING UNPAID TAXES; AND HIS LIABILITY MAY BE ENFORCED BY THIS SUMMARY PROCEEDING

It is well-settled that a stockholder who receives property or money on the dissolution of a corporation is liable for unpaid debts of the corporation to the extent of the distribution to him. *Curran* v. *Arkansas,* 15 How. 304, 307; *Capps Mfg. Co.* v. *United States,* 15 F. (2d) 528 (C. C. A. 5th); *United States* v. *Garbutt,* 35 F. (2d) 924 (C. C. A. 10th); *Hatch* v. *Morosco Holding Co.,* 50 F. (2d) 138 (C. C. A. 2d); Cook on Corporations (8th Ed.), Sec. 641. Cf. *Angle* v. *Chicago, St. Paul Ry. Co.,* 151 U. S. 1, 26; *Russell* v. *United States,* 278 U. S. 181; *Phillips* v. *Commissioner, supra,* 592, and cases there cited.

This liability is often expressed in terms of a trust fund, but the relationship is in reality that of the debtor to his creditor. Another view, producing the same result, is that the stockholder takes the property impressed with a trust and is liable

for breach of the trust if he converts the property to his own use. Cf. *Oliver* v. *Piatt*, 3 How. 333, 401. None of the cases above cited has required that the creditor trace the specific property in order to subject the stockholder to liability. In some cases the inapplicability of the requirement that there be tracing has expressly been recognized. *McWilliams* v. *Excelsior Coal Co.*, 298 Fed. 884, 886 (C. C. A. 8th); *Hutton* v. *Commissioner*, 59 F. (2d) 66 (C. C. A. 9th); Fletcher on Corporations (1933), Sec. 8161.

It follows that the decedent and his representatives were liable for these unpaid taxes, whether or not the cash received from the corporation could be traced. This liability must, under Illinois law, in turn be assumed by the legatee, who has received assets from the estate in excess of this indebtedness of the decedent. *Sutherland* v. *Harrison, supra; Cutright* v. *Stanford, supra;* see also *supra*, pp. 12–14.

Since Section 280 provided a new remedy for the preexisting liability (*Phillips* v. *Commissioner, supra*, 594), the liability may be enforced under the summary procedure.

If this Court should hold that petitioner as a legatee of a transferee is not a transferee within the meaning of Section 280 (f), this does not preclude his liability predicated on the present ground. The section provides that the term transferee "includes" a legatee, etc. This plainly means "embraces", and not (if this Court should correspond-

ingly construe Section 280 (f), that none but a legatee of a taxpayer may be a transferee. See *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121. The fact that petitioner is also a legatee, and even that he acquired the decedent's property by legacy, is wholly fortuitous to his status as one against whom may be enforced claims under Section 280 (a). If there be doubt, the provision must be examined in the light of the history of tax enforcement and the purpose of the provision. *Helvering* v. *Morgan's, Inc., supra,* 126. It cannot be thought that Congress, in providing a more effective and expeditious remedy, intended to narrow the class of persons subject to the liability.

V

PETITIONER IS LIABLE AS THE RECIPIENT OF PROPERTY IMPRESSED WITH A TRUST AND HIS LIABILITY MAY BE ENFORCED BY THIS SUMMARY PROCEEDING

The petitioner is liable under the trust fund theory, irrespective of the construction this Court may give to Sections 280 and 281 or the Illinois law of decedents' estates. One who receives property from a transferor who owes the Government unpaid taxes takes this property impressed with a trust in favor of the Government. *Phillips* v. *Commissioner, supra,* 592. This is the case whether he takes it directly or through an intervening party. *May* v. *LeClaire,* 11 Wall. 217; *Bayne* v. *United States,* 93 U. S. 642. Petitioner seeks to escape this liability by the contention that the cash which

he received as legatee has not been shown to be comprised of the specific dollars which the decedent received from the dissolved corporation. In arguing that it is necessary that specific dollars be traced, petitioner confuses the nature of the trust fund doctrine.

Recognizing that it would always be impossible to trace the specific dollars which were impressed with a trust, the courts do not require that one be able to point to a given dollar bill and say that it is held in trust for the rightful owner. Equity, to avoid injustice, erects a conclusive presumption that the money of the rightful owner is the last to be withdrawn from the intermingled fund. *Knatchbull* v. *Hallett,* L. R., 13 Ch. 696; *National Bank* v. *Insurance Co.,* 104 U. S. 54, 66–70.

Thus, to the extent that the fund remains intact, to that extent is the rightful owner able to trace his money and impress the fund with a trust. *St. Louis & S. F. R. R.* v. *Spiller,* 274 U. S. 304, 309–310, relied upon by petitioner, does not hold to the contrary. There the claimant was unable to trace his money into any specific fund and he failed to show that any specific fund, as opposed to the aggregate of all the separate deposits, remained intact throughout the twelve years after the wrongful taking. Since the burden was on him, he was properly held not to have succeeded in tracing his money so as to impress it with a trust.

The final formulation of the trust fund doctrine by this Court was in *Jennings* v. *United States F.*

& G. Co., 294 U. S. 216, 224. There the Court stated that "a trust so created will not fail though other dollars may have taken the place of those originally received, for dollars are fungibles and any one of them will be accepted as substitute for another."

In the present case the decedent received a dividend on dissolution of a corporation which owed the United States a large amount of unpaid taxes. His executors transmitted to petitioner, as legatee, a sum much in excess of that received by the decedent from the corporation. Although the burden is placed upon the Commissioner "to show that a petitioner is liable as the transferee of property of a taxpayer" (Section 602 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 873), he had established a *prima facie* case when he showed these facts. *Hutton* v. *Commissioner*, 21 B. T. A. 101, 103, 59 F. (2d) 66, 69. Thereafter the petitioner, to rebut this case, must assume the general burden resting on all petitioners before the Board of Tax Appeals. *Welch* v. *Helvering*, 290 U. S. 111, 115; *Old Mission Co.* v. *Helvering*, 293 U. S. 289, 294. Further, petitioner alone has full access to and knowledge of the records of the decedent, who was his father (R. 19); the executors, of whom he was one; and the legatee, who is petitioner himself. If he fails to produce evidence so peculiarly within his knowledge, the presumption must be against him. *The Aurora*, 7 Cranch 382, 387; *Runkle* v. *Burnham*, 153 U. S. 216, 225; *Kirby* v. *Tallmadge*, 160 U. S. 379, 383. In the face of this double burden which the petitioner

must carry, he has offered nothing to show that the funds, with which the dividend was paid decedent on the corporation dissolution, have not remained intact to the extent of the $8,000 which the decedent received. It follows that the moneys received by petitioner must be taken to be those paid decedent by the corporation on its dissolution, and which were rightfully due the United States for unpaid taxes.

Petitioner, therefore, is liable under the equitable doctrine of the trust fund, independent of any statutory provision and of the Illinois law of decedents' estates.

Since Section 280 provided a new remedy for the preexisting liability (*Phillips* v. *Commissioner, supra,* 594), the liability of petitioner as a recipient of property impressed with a trust may be enforced under this summary procedure. This is the case irrespective of the construction which this Court may place upon Section 280 (f). See pp. 28–29, *supra.*

Petitioner and the Government unite in calling to the attention of the Court *United States* v. *Myers,* (Equity No. 4300, N. D. Ohio), decided September 13, 1935. In an unreported memorandum, the trial court held that the United States, bringing suit under the trust fund theory, could not recover a transferee liability of a decedent where there was no evidence that his estate presently possessed any of the assets of the taxpayer. The case did not arise under Sections 280 and 281, and the Government as plaintiff was considered not to have

carried its burden of tracing the assets. The case is thus thought not to be in point, since here the burden seems properly to rest upon petitioner. A motion in arrest of judgment and for a rehearing has been made.

In his brief on the merits, petitioner seems to have abandoned the contention raised in his petition for writ of certiorari (Petition, p. 2), that Sections 280 and 281 of the Revenue Act of 1926, as construed and applied by the court below, violate the Fifth Amendment. Since petitioner's brief does not discuss this point, although it is included in the assignment of errors (Brief, p. 9), the Government deems unnecessary to answer it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
N. A. TOWNSEND,
MAURICE J. MAHONEY,
Special Assistants to the Attorney General.

OCTOBER 1935.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227, 264:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of

the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided,* That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 299:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes", approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. * * *

(U. S. C., Title 26, Sec. 1057.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(U. S. C. App., Title 26, Sec. 1048.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for

other purposes", approved October 3, 1913, the Revenue Act of 1916, and Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

(U. S. C. App., Title 26, Sec. 1057.)

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the tax-

payer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act, but assessment against the taxpayer was made within such period, then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

* * * * *

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

(U. S. C. App., Title 26, Sec. 1069.)

SEC. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the

purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(U. S. C. App., Title 26, Sec. 1070.)

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

(U. S. C. App., Title 26, Sec. 1064.)

SEC. 1005. (a) The decision of the Board shall become final—

* * * * *

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected. * * *

(U. S. C. App., Title 26, Sec. 1228.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 870:

SEC. 505. SAME—TRANSFEREE CASES.

(a) Section 280 (d) of the Revenue Act of 1926 is amended to read as follows:

"(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the

mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter."

* * * * *

REVISED STATUTES

SEC. 3467. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

(U. S. C., Title 31, Sec. 192.)

U. S. GOVERNMENT PRINTING OFFICE: 1959

SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1935.

De Forest Hulburd, Petitioner, *vs.* Commissioner of Internal Revenue, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 9, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy is one as to the liability of the executor and legatee of a shareholder in a dissolved corporation for a deficiency of income and profits taxes assessed against the company.

In September, 1919, the Van Sicklen Company, an Illinois corporation, sold all its assets to a Delaware corporation, the Van Sicklen Speedometer Company, and was thereupon dissolved. In consideration of the sale it received $250,000 in cash and 5,000 shares in the new company, which it distributed forthwith among its own shareholders. One of these shareholders was Charles H. Hulburd. His distributive portion on the dissolution of the company was $8,000 in cash and 160 shares of no-par stock. He died on January 14, 1924, leaving a will by which his son, De Forest Hulburd, and Hugh McBirney Johnston were appointed executors. The son, who is the petitioner in this court, was also a legatee and devisee. The coëxecutor, Johnston, is dead.

In December, 1919, the Van Sicklen Company filed a corporation income and profits tax return for the fiscal year ending September 30, 1919. The return, however, was inadequate. Accordingly, on November 17, 1924, the Commissioner of Internal Revenue made an additional assessment in the sum of $227,872.06, with penalties in the sum of $113,936.03. Unable to collect this deficiency from the company after the distribution of its assets, he turned to the shareholders. On October 27, 1926, he mailed a letter to the "Estate of Charles H. Hulburd, c/o De Forest Hulburd, 86 East Randolph Street, Chicago, Illinois." In this he gave notice of a proposed assessment "against the estate" by reason of its liability as transferee of the assets of the Illinois corporation. The amount of that

liability was stated to be $24,000, but was afterwards reduced to $8,000, the cash received by the testator. In announcing this assessment, the Commissioner acted in reliance on § 280 of the Revenue Act of 1926 (26 U. S. C. App. § 1069); which permits an assessment against the transferee of a taxpayer upon the taxpayer's default. Before the passage of that act shareholders who had received the assets of a dissolved corporation might be compelled to discharge unpaid corporate taxes, but only by bill in equity or action at law. *Phillips* v. *Commissioner*, 283 U. S. 589, 592, 593. A summary procedure was added by the statute. *Phillips* v. *Commissioner, supra.* Upon the default of the taxpayer, the Commissioner is to apportion the deficiency among the transferees of the property and to give notice accordingly. Revenue Act of 1926, § 274. If the transferee is dissatisfied, he may petition the Board of Tax Appeals to redetermine the existence of liability and its proper distribution.

On October 27, 1926, when notice of the proposed assessment was sent to the petitioner, the estate of Charles H. Hulburd had been settled, the assets distributed and the executors discharged.[1] The discharged executors submitted to the Board of Tax Appeals a petition for review disclaiming liability. They stated in effect that they were the persons who had been appointed executors by the will of Charles H. Hulburd, but that their responsibilities as such were ended. Enumerating their objections to the assessment they alleged that the action of the Commissioner was erroneous for

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[1] The decree of the Probate Court of Cook County, Illinois, the place of administration, was made on February 26, 1925, and, the text being important, is quoted in full:

"In the Matter of the Estate of Charles H. Hulburd, Deceased.

"This day came Hugh McBirney Johnston and De Forest Hulburd, executors of the last will and testament of Charles H. Hulburd, deceased, and presented to the court and filed herein their final account with the estate of said decedent, showing that said estate has been fully administered.

"And it now appearing to the court that more than one year has elapsed since the granting of letters testamentary herein; that due notice has been given to all of the heirs at law, legatees and beneficiaries; that all assets of said estate have been collected; that no claims have been filed against said estate; that specific legacies have been paid; that the Inheritance tax, Federal estate tax, Income tax, court costs and all other costs and expenses of administration herein have been paid, and that the balance of said estate has been distributed according to the last will and testament of said decedent, and guardian ad litem consenting to the appproval of said final account.

"It is therefore ordered by the court that said final account be approved and recorded, that the estate be and it is declared settled and that the executors be and they are hereby discharged."

the reason that the estate had been "wholly distributed and settled and your petitioners duly discharged as executors thereof." Thus, as early as December, 1926 (when the petition for review was filed) and before the period of limitation under the statute had run against a new assessment against legatees or devisees (Revenue Act of 1926, § 280 (b) (2)), the Commissioner was put upon notice that the deficiency had been assessed against persons no longer liable and was given the opportunity to impose it upon others. Instead of doing this he stood his ground and prayed for an order that his determination be confirmed.

The Board of Tax Appeals held that "at the time the notice was mailed there was no liability of the estate or of the petitioners as executors." It put aside the consideration of a possible "liability of any of the beneficiaries under the will or the distributees of the assets of the estate" on the ground that no such question was in the case. 27 B. T. A. 1123; cf. 21 B. T. A. 23. The decision of the Board was reviewed by the Circuit Court of Appeals for the Seventh Circuit. That court decided that the executors were liable *de bonis testatoris* because they had failed to give notice to the Commissioner that their fiduciary capacity had terminated. Revenue Act of 1926, § 281 (b). Besides this, the court held that De Forest Hulburd was liable individually to the extent of $4,000 because in the record there was evidence, not confirmed by any finding, that as legatee under the will he had received half of the $8,000 paid to his father on the dissolution of the company. The order of the Board was accordingly reversed, and the cause remanded for proceedings to conform to the opinion. 76 F. (2d) 736. The power was thus assumed to change a deficiency assessed against the executors of an estate into a deficiency to be assessed against a legatee who had shared in the estate. To determine the validity of that assumption and to settle other questions of statutory construction, a writ of certiorari was granted by this court.

First: The petitioner is not chargeable in this proceeding with liability as legatee under the will of a deceased shareholder in the taxpayer, a corporation now dissolved.

The Act of 1926 (c. 27, 44 Stat. 9, § 280; 26 U. S. C. App. § 1069), in supplementing by a summary procedure the cumbrous remedy of suit, laid the duty of assessment upon the Commissioner of Internal Revenue. "The liability, at law or in equity, of a

transferee of property of a taxpayer" was to be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations" as in the case of any other tax deficiency. *Ibid* § 280 (a) (1). Pursuant to this mandate the Commissioner did assess a liability and gave notice to the transferee accordingly. He assessed it to the estate represented by executors, and not to any one else. "As provided by Section 280 of the Revenue Act of 1926, there is proposed for assessment against the estate the sum of $24,000 constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois." The Board of Tax Appeals upon petition for review had power to redetermine the deficiency thus charged to the estate (Revenue Act of 1926, § 274), but not to charge it to another. Cf. 26 U. S. C. (1934 ed.) §§ 600, 601, 619; *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 562, 564. If some one else was to be charged, there would be need of a new assessment, which the Commissioner might make at any time within a year after the enactment of the statute. Revenue Act of 1926, § 280 (b) (2). In making it he would consider any facts material and relevant for arriving at a just apportionment of benefits and burdens. The duty to inquire and determine was imposed by the statute upon him and not upon an agency of government established for the purpose of revising his decision. These restraints upon jurisdiction were duly heeded by the Board. It disclaimed the power or the purpose to pass upon the liability of legatees or devisees or to assess a tax against them. The same restraints upon jurisdiction were binding upon the Court of Appeals in reviewing the action of the Board, and binding with greater emphasis, for the court was without power to choose between conflicting inferences unless only one was possible, or to try the case *de novo*. *Helvering* v. *Rankin*, 295 U. S. 123. The adjudication of liability as to Hulburd individually was made in seeming forgetfulness of these jurisdictional restrictions. It was error to ignore them.

In so holding we are not unmindful of the argument for the respondent that the form of the petition to review the action of the Commissioner was effective in some way to enlarge the scope of the proceeding and to subject the legatee to a new and different assessment. The argument will not stand. There is nothing in the petition submitted to the Board whereby power was extended

beyond the statutory limits, if we assume provisionally that consent might be effective, at least in certain circumstances, to bring that result about. The petitioners, having been discharged as executors, were unwilling to describe themselves as if they were still acting in that capacity. What they did was to state the facts and ask the judgment of the Board thereon. Far from conceding that the assessment ran against either of them personally, they protested that in form and in purpose it was an assessment against the estate and hence was of no validity after the estate had been settled and the executors discharged. The meaning of their protest was not subject to misconstruction, nor in fact was it misconstrued, as the opinion of the Board shows if the fact might otherwise be doubtful. When the protest had been made, the remedy available to the Commissioner was obvious and ample. He had time even then as we have already pointed out, to announce a new assessment, which would have brought up the question whether the liability once resting on the executors had devolved upon another. For reasons not disclosed he determined not to do so. In such circumstances the cases cited by the government, where a formal defect has been ignored in circumstances tending toward an inference of waiver or estoppel,[2] have no relation to the case at hand. We are not required at this time to approve or disapprove them. In this case there was neither waiver nor estoppel, but a steady insistence that the deficiency had been assessed against the estate and no one else, and that the liability of the estate had ended. To hold that by consent, either tacit or express, the proceeding had been turned into one to review the validity of a different assessment, and one never in fact made, would be a perversion of the record.

Second: The estate having been settled and the executors discharged, the petitioner was *functus officio* under the law of Illinois, and was no longer subject to an assessment in his representative capacity.

The Court of Appeals in upholding the liability of the executors as such put its ruling upon the ground that they had failed to give

[2] Commissioner v. New York Trust Co., 54 F. (2d) 463; Haag v. Commissioner, 59 F. (2d) 516; Burnet v. San Joaquin Fruit & Investment Co., 52 F. (2d) 122; Warner Collieries Co. v. United States, 63 F. (2d) 34; American Equitable Assurance Co. of New York v. Helvering, 68 F. (2d) 46; Continental Products Co. v. Commissioner, 66 F. (2d) 434; Bunard v. Helvering, 77 F. (2d) 391; Commissioner v. Nichols & Cox Lumber Co., 65 F. (2d) 1009; Pittsburgh Terminal Coal Corp. v. Heiner, 56 F. (2d) 1072.

notice to the Commissioner of the termination by decree or otherwise of their fiduciary capacity. The notice was thought to be requisite under § 281 (b) of the Revenue Act of 1926, which is quoted in the margin.[3] But the Revenue Act of 1926 became a law in February of that year (§ 286; 26 U. S. C. § 931), and the executors were discharged in February, 1925. If their liability as executors was ended at that time, the statute will not be read as attempting to revive it. *White* v. *United States*, 191 U. S. 545; *Winfree* v. *Northern Pacific R. Co.*, 227 U. S. 296; *Union Pacific R. Co.* v. *Laramie Stock Yards*, 231 U. S. 190, 199; *Shwab* v. *Doyle*, 258 U. S. 529; *Liberman's Committee* v. *Commissioner*, 54 F. (2d) 527.

Section 281 (b) being found to be inapplicable, we have still to determine whether executors who have been discharged after a full settlement of the estate are subject by the law of Illinois to assessment or suit in their representative capacity.

By the common law of England an executor was deemed to carry forward the *persona* of the testator. Holmes, The Common Law, pp. 344, 345; Holdsworth's History of English Law, vol. 3, pp. 563, 573, 574, 583; Littleton's Tenures, § 337; Co. Litt. 209, a, b; *Mechanics' Savings Bank* v. *Waite*, 150 Mass. 234, 235; *Chipman* v. *Manufacturers' National Bank*, 156 Mass. 147, 149. Unless the appointment was qualified in respect of time, it continued during life. Williams, Executors, 12th ed., vol. 1, pp. 131, 147, 342. There was no such thing as a discharge upon a showing of *plene administravit*. There was no such thing as a resignation because of mere unwillingness to go on. *Rogers* v. *Frank*, 1 Younge and Jervis 409, 414; *In the Goods of Heslop*, 1 Robertson's Ecclesiastical Rep. 457, 458; *In the Goods of Veiga*, 3 Swabey & Tristram 13, 15. The power to act might be suspended or revoked through the appointment of a committee or a receiver if the executor was found to be physically or mentally incapable. *In the Goods of Binckes*, 1 Curteis 286; *In the Goods of Newton*, 3 Curteis 428; *In the Goods of Cooke*, [1895] P. D. 68; *In the Goods of Goldschmidt*,

[3] "Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated."

78 L. T. (N. S.) 763; *In the Estate of Shaw*, [1905] P. D. 92. There might be like relief if he had become insolvent after probate or had disappeared or had misappropriated the assets or otherwise abused his trust. *In the Goods of Covell*, [1889] P. D. 8; *Estate of Thomas*, [1912] P. D. 177; *Utterson* v. *Mair*, 2 Ves. Jr. 95, 97, 98; In the Goods of Loveday, [1900] P. D. 154, 156; *Oldfield* v. *Cobbett*, 4 L. J. (N. S.) (Chan.) 271, 272; *Richards* v. *Perkins*, 8 L. J. (N. S.) (Ex. Eq.) 57, 58. Nothing short of clear necessity would cause him to be ousted. In the absence of peril to the estate, responsibility and power were not to be renounced when once they had been assumed. So the law of England continues even now.[4]

The common law rule is preserved in some of our states today, but in many has been abandoned, at times as the result of statute, at times through the combined force of statute and decision. The diversity of doctrine is surprising, and so often is its obscurity. The commentators tell us, however, and, as the cases show, correctly, that the growing tendency in this country is away from the English rule.[5] Some states, though they make provision for an aaccounting, make none for a discharge, and hold the executor suable after the estate has been distributed upon the chance that other property may be discovered later on. The judgment will be collectible out of assets *in futuro*, or *quando acciderint*, as was said in early days. Williams, *supra*, vol. 2, p. 1253; *Mary Shipley's Case*, 8 Co. 134, a, b; *Noell* v. *Nelson*, 2 Saund. 226. This in effect is the practice in New York (*Mahoney* v. *Bernhard*, 45 App. Div. 499, 501; aff'd, 169 N. Y. 589; *Willets* v. *Haines*, 96 App. Div. 5, 7; *Rosen* v. *Ward*, 96 App. Div. 262, 266; *Pearse* v. *National Lead Co.*, 162 App. Div. 766, 769; *Paff* v. *Kinney*, 1 Bradf. 1, 9), where a judicial settlement of accounts is conclusive as to the past, but is never ultimate in the sense that it relieves the fiduciary from liability for the future. See also *Haslett* v. *Estate of Blakely*, 70 Neb. 613, 617; *Weyer* v. *Watt*, 48 Ohio 545, 551. On the other hand, there are states where by express provision of the statutes the executor is to be discharged upon a showing of full adminis-

[4] Cf. 14 Halsbury, Laws of England, 2d ed., pp. 171, 269, 287, 288, and cases cited.

[5] See Woerner, The American Law of Administration, 3rd ed., vol. 3, §§ 571, 572, 573, where the cases are brought together.

tration, and others where the requirement of a discharge has been read into the statutes by a process of construction.[6]

The courts of Illinois, as we interpret their opinions, maintain a middle ground, which is neither that of the common law on the one side nor its opposite on the other. This is not to say that there is any case in that state so like in its essential feaures to the one for decision here as to make the Illinois position certain. On the contrary, support will be found for the strict rule of the common law if what has been said in some of the opinions is taken from its framework and considered without reference to what was actually decided. See, e. g., *Starr* v. *Willoughby*, 218 Ill. 485, 493. The aspect becomes different, however, when attention is directed to the setting of the facts and to the provisions and implications of the applicable statutes. What emerges, it would seem, is this: A discharge upon an accounting will be vacated in a direct proceeding if it appears that there were assets, not inventoried by the executor or included in his report, for which, when the decree was passed, he was properly accountable (*Fraser* v. *Fraser*, 149 Ill. App. 186, 187, 195, 196; cf. *Musick* v. *Beebe*, 17 Kan. 47, 53, 54): in the absence of such a showing, the discharge when decreed upon a finding of full administration will relieve the executor for the future of responsibility and power. Cf. *Reizer* v. *Mirtz*, 223 Ill. 555, 562, 564; *Robinson* v. *Robinson*, 214 Ill. App. 262, 268, 269.[7]

[6] Minnesota: Security Trust Co. v. Black River National Bank, 187 U. S. 211, 234, reviewing the state decisions; State ex rel. Matteson v. Probate Court, 84 Minn. 289, 293 (Since 1903 the right to a discharge has been reinforced by statute. Acts of 1903, c. 195; 1 Mason's Stats., 1927, § 8886.); Missouri: Grayson v. Weddle, 63 Mo. 523, 539, 540; State ex rel. Stotts v. Kenrick, 159 Mo. 631; In re Estate of Rooney, 163 Mo. App. 389, 394; cf. Kentucky: U. S. Fidelity and Guaranty Co. v. Martin, 143 Ky. 241, 242, 243; West Virginia: Downey v. Kearney, 81 W. Va. 422, 426. See also, Alabama: Modawell v. Holmes, 40 Ala. 391, 404; Hicky v. Stallworth, 143 Ala. 535; 540; Code, 1928, § 5962; California: Willis v. Farley, 24 Cal. 490, 502; In re Clary, 112 Cal. 292, 294; Probate Code, 1933, § 1066; Georgia: Carter v. Anderson, 4 Ga. 516; Groce v. Field, 13 Ga. 24, 30; Code, 1933, § 113-2302; Iowa: Diehl v. Miller, 56 Iowa 313; Code, 1931, § 12052; Kansas: Musick v. Beebe, 17 Kan. 47, 53, 54; Proctor v. Dicklow, 57 Kan. 119, 125; Rev. Stats., 1923, § 22-931; Montana: State ex rel. Petters & Co. v. District Court, 76 Mont. 143, 148; Rev. Code, 1921, §§ 10311, 10331; Pennsylvania: Vandever's Appeal, 42 Penn. 74; Estate of John Wiseman, 12 Phila. 11; 20 Purdon's Stats., § 911; South Carolina: Seabury v. Green, 294 U. S. 165, 169; Quick v. Campbell, 44 S. C. 386, 392; McNair v. Howle, 123 S. C. 252, 266; Code, 1932, § 9024.

[7] Leading cases in Illinois are brought together in this note for the purpose of distinguishing dictum from decision: Blanchard v. Williamson, 70 Ill. 647, 650, holds that a discharge of an administrator will be treated as a nullity if made while the estate is in course of administration; Diversey v. Johnson, 93

Whatever doubt may survive a reading of the cases is dispelled or greatly attenuated when we pass to an examination of the statutes and the plan that they reveal.

First in order of importance is the statute regulating the settlement of accounts.[8] An executor is required to exhibit a report of his administration within thirty days after the expiration of one year from the date of his letters. That being done, he must exhibit a report thereafter, whenever required by the court, "until the duties of administration are fully completed." He may from time to time at his own volition file "a final report of his administration to a specified date", which, even if approved, will not terminate his office. He may also make a final report "at the conclusion of administration."[9] Such a report, if approved upon notice to all parties in interest, shall be binding upon them "in the absence of fraud, accident or mistake." A final report "at the conclusion of administration" assumes that there is a stage when administration is over. The executor is *functus officio* when discharged by the court after that stage has been attained.

Another statute of high significance is one that makes provision for an appraisal of the assets.[10] If the executor discovers after the making of an inventory and appraisal that the assets of the estate do not exceed the amount of the widow's allowance, after deducting necessary expenses, he is to report the facts to the court. Thereupon the court, if it finds the report to be true, shall order the assets to be delivered to the widow, "and discharge the executor or administrator from further duty." Plainly such a discharge

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Ill. 547, 558, holds that a discharge is of no effect if obtained by the administrator with notice of an outstanding claim and in fraud of the rights of the adverse claimant (cf. People v. Rardin, 171 Ill. App. 226, 230); Bayless v. People, 56 Ill. App. 55, 58, holds that a surety is liable on an executor's bond where a balance available for creditors was wrongfully distributed; Starr v. Willoughby, 218 Ill. 485, 492, holds that a power in trust, unrelated to the office of executor, will survive a decree which purports to discharge him; and Maguire v. City of Macomb, 293 Ill. 441, 453, is substantially to the same effect. No case has been found where an executor whose discharge had been decreed after a full and fair accounting has been held suable thereafter in his representative capacity.

[8] Laws of 1872, p. 77, at pp. 105, 106, § 112; amended by Laws of 1919, p. 1, at p. 3; Laws of 1931, p. 6; Laws of 1933, p. 3, at p. 6; now Revised Statutes, 1935, c. 3, § 114.

[9] See Laws of 1931, p. 6.

[10] Laws of 1872, p. 77, at p. 92, § 59; Laws of 1919, p. 1, at p. 2; now Revised Statutes, 1935, c. 3, § 60.

is equivalent to a termination of the office. There is not only exoneration for the past, but absolution for the future.[11]

The decree of the Probate Court discharging this executor must be read against the background of this statutory scheme. It is too precise in its terms to be dismissed as amounting to nothing more than a confirmation of the report as submitted for approval. If words can express an intention to declare administration ended, the expression is not lacking here. We may not put all this aside as surplusage. If there was no power in the Illinois court to give relief so comprehensive, the defect should be very clear before a federal court will undertake to wrest the words of the decree from their natural and ordinary meaning or hold them to be futile. Especially is that so in view of the growing tendency of probate courts throughout the land to break the shackles of the ancient rule. Weighty considerations of expediency and justice explain this tendency and support it. In the thought of many judges, an executor discharged after a full and fair accounting is no longer to be vexed by the annoyance and expense of defending fruitless suits with assets no longer available for reimbursement or indemnity. If suitors or taxgatherers wish to go against the estate or against those who have shared in it, they must either vacate the decree upon a showing of assets unaccounted for, or procure upon a showing of necessity the appointment of an administrator, or pass over the estate and its representatives and pursue the legatees to the extent of benefits received. There was no attempt to tread those paths, though the last at all events was open.

The controversy in this aspect is one of local law, which, once it is ascertained, must be accepted as controlling. *Security Trust Co.* v. *Black River National Bank, supra; Forrest* v. *Jack*, 294 U. S. 158; *Seabury* v. *Green*, 294 U. S. 165. The decree discharging the executors amounts to a construction of the Illinois statute by a court of the state, and a court of special competence and experience in disposing of such questions. There being no satisfactory showing that the decision overpasses the bounds of jurisdiction, we yield to its authority.

The decree of the Circuit Court of Appeals is reversed and the order of the Board of Tax Appeals affirmed.

It is so ordered.

[11] Still another inroad upon the common law rule is made by a statute allowing an executor to resign whenever it appears to the court that a resignation is proper. Laws of 1872, p. 77, at p. 88, § 40; now Revised Statutes, 1935, c. 3, § 41.